No. 14481

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEERING-MILLIKEN & CO., INC., a corporation,

Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a corporation,

Appellee.

Appeal From the District Court of the United States for the Southern District of California, Central Division.
Hon. Ernest A. Tolin, Judge.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

PAGE

II.

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

DICTIONARIES PAGE

STATUTES

TEXTBOOKS

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Statement of Jurisdiction.

This is an appeal by Deering-Milliken & Co., Inc., defendant, from a final judgment against it in the United States District Court for the Southern District of California, Central Division, docketed and entered on May 18, 1954. Within thirty (30) days from the entry of said judgment and on June 17, 1954, appellant duly filed its Notice of Appeal therefrom. [Tr. I, p. 35.] Jurisdiction of the within appeal therefore exists in this Court by virtue of the provisions of Title 28, *United States Code,* Sections 1291 and 2107.

Jurisdiction of the within cause existed in the trial court by virtue of Title 28, *United States Code,* Section 1332-(a)(1). Plaintiff-appellee is a California corporation and defendant-appellant is a New York corporation and the matter in controversy exceeds the sum of $3,000, exclusive of interest and costs. These facts are alleged by plaintiff in paragraph I of its complaint [Tr. I, pp. 3-4], and are found to be true by the trial court in paragraph I of its Findings of Fact. [Tr. I, p. 25.]

Statement of the Case.

Introduction.

Appellant realizes that this opening brief is lengthy. We feel this is necessary, however, in order to properly set forth the evidence and to argue the novel rulings made by the District Court which appellant believes constitute reversible error. In addition, appellant has attempted to set forth a brief, but complete, summary of the facts involved on this appeal which concerns the specialized and technical industry of textiles.

This is an action by appellee Modern-Aire of Hollywood, Inc., a corporation wholly owned by Leonard Mills, its president, against appellant Deering-Milliken & Co., Inc., national sales agency for certain textile mills located in the Carolinas. Appellee's complaint alleges the formation, existence and breach by appellant of a contract with appellee for the purchase and sale of 126,000 yards of rayon goods, resulting in damage to appellee in the claimed amount of $17,118.04. [Tr. I, pp. 3-16.] Appellant's answer specifically denies the existence of any contract with appellee, the alleged breach thereof by appellant, and that appellee suffered any damage due to the conduct of appellant. [Tr. I, pp. 16-17.]

The basis of appellee's claim arises out of its insistence that preliminary oral and written negotiations between appellant and appellee ripened into an enforceable written contract on March 6, 1952. This contract allegedly provided that appellant agreed to manufacture and deliver to appellee 126,000 yards of rayon cloth which appellee sought to use in the manufacture of inner assembly liners for cartridge cases for the United States government. As a result of an alleged breach of this contract, appellee sued to recover as damages (1) profits allegedly lost from the government contract and (2) a penalty for which the United States has allegedly made claim from appellee for failing to perform its government contract.

Appellant contends simply that no contract, written or otherwise, was ever entered into between appellant and appellee and in the alternative, that if a contract did exist and was breached by this appellant, appellee did not suffer such damage as under the law is recoverable from appellant.

The Parties.

In order to properly analyze and understand this action, one must at the outset consider the parties involved and, since those parties are corporations and thus may speak only through their authorized representatives, the persons who are alleged to have spoken on their behalf.

According to the testimony of its president and sole owner, Leonard Mills, at all times here pertinent plaintiff Modern-Aire of Hollywood, Inc. (hereinafter referred to as Modern-Aire or as appellee) has been a California corporation whose physical assets, leased and owned, were those of a manufacturer of *finished* textile products. Prior to its acquisition by Mr. Mills, it had been in the business of manufacturing finished textile products for several years. When acquired by Mr. Mills, it was, in his words, a shell of a company with a tax loss carry forward of which he planned to take advantage. Acquired for the primary purpose of having a medium through which Mr. Mills might seek to obtain government contracts for finished textile items, Modern-Aire in fact never produced a single item until late in 1952 (after its negotiations with appellant) when, for a very short time, its facilities were used by Mr. Mills in the manufacture of ladies sportswear. Although contracts for the manufacture of flare parachutes, surgical drapes and 105 mm. and 75 mm. cartridge case liners were all sought from agencies of the United States during the period here in question, the only government contract ever obtained by Modern-Aire was one for 105 mm. cartridge case liners presented in this action as Plaintiff's Exhibit 12. [Tr. I, pp. 73-74, 117-118, 120-122, 124.]

With one exception [Tr. II, p. 567] Mr. Mills himself when directly questioned regarding the subject denied all

but the most limited knowledge of the textile industry, its customs, usages and terminology, but apparently has in fact been connected with that industry in one way or another since childhood and for more than twenty-five years, except for one venture into the jewelry business. As a youth he "worked, worried and enjoyed" with his father in the hat manufacturing business owned by his father and the retail millinery shops operated by his mother and father. During his college years he spent part of a year traveling on the road for Stock Bros. Ribbon Corporation and, after his father's death, assisted his mother in the operation of the retail millinery shops above noted. Apparently during the course of his operation of one of his enterprises, a war surplus business, he bought and sold on various occasions cotton and burlap goods and negotiated for the manufacture of or manufactured handkerchiefs, burlap bags and furniture materials. [Tr. I, pp. 71-73, 114-119.]

Defendant Deering-Milliken & Co., Inc. (hereinafter referred to as Deering-Milliken or as appellant) is one of the largest textile sales agencies in the United States, as well known in the textile industry as are General Motors or Chrysler in the automobile industry. With main offices in New York and sales offices in New York and other major cities throughout the United States, it acts and has acted for more than 80 years as selling agent for various cotton, woolen and rayon mills in the Carolinas. However, appellant is only a sales agency. It neither manufactures cloth nor owns the mills which do manufacture cloth. Appellant's sole purpose is to find customers for the various textile mills that it represents. In this sense appellant may be likened to a stock broker whose function is to transmit the present market price of particular cloth, referred to as a "quotation," among the trade, and thus bring the buyer and seller together. Appellant's method of operation is fixed and widely known in the industry. [Tr. II, pp. 618, 623-624, 690-691.]

Appellant's local sales offices, such as that maintained in Los Angeles and managed by Mr. Lee Piersol, solicit, re-

ceive and transmit both "inquiries" (requests for quotations) and "orders" for textile goods to the New York head office where they are in turn referred to the proper mill for quotation and, in the case of orders, for acceptance or rejection. Local sales offices have no contact with the mills themselves. The replies of the textile mill in response to "inquiries" are referred through the New York main office to local sales offices for transmittal to the person making the inquiry. In the case of an order, a formal written contract or "Salesnote" is prepared in appellant's New York office and sent directly to the person placing the order for his signature. This, however, is done only after the order actually has been accepted *by the mill* and processed through appellant's credit department. [Tr. II, pp. 440-446, 618-620.] These practices of Deering-Milliken are consistent with those of all other major sales agencies in the textile industry and, in fact, are the sales practices of that industry. [Tr. II, pp. 623-624.]

Mr. Lee Piersol, manager of the Los Angeles office, although in full charge of salesmen, office personnel and local office management, has and asserts no authority to make quotations, accept orders or enter into contracts on behalf of either Deering-Milliken or the mills represented by Deering-Milliken. Questions regarding availability of particular fabrics, price, delivery, shipping, credit terms and all other details are invariably referred to the New York office for reply. [Tr. I, pp. 339-341; Tr. II, pp. 370-373, 470, 547-549.] To anyone even remotely familiar with the textile industry, these procedures are obviously essential, for a given mill has only so many looms and the availability and scheduling of those looms for the manufacture of a particular order is, along with price and credit establishment, a key factor in the determination of whether or not that particular order can be accepted or rejected by the mill involved.

Modern-Aire does not deny these trade usages but claims a lack of personal knowledge of them. In this connection

it should be noted that these procedures, as well as the limited authority of appellant's local offices, were explained to Mr. Mills and he, in fact, admits knowledge of them in some detail. [Tr. I, pp. 98, 156-160, 205-208; Tr. II, pp. 448-449, 470.]

Since some mills represented by Deering-Milliken specialize in the production of cotton goods, others in the production of woolen goods and others in the production of the various synthetic fabrics such as rayon, the New York main office of Deering-Milliken is departmentalized accordingly. In charge of the rayon goods department in New York is J. C. Harris. Under his supervision and specializing in the handling of inquiries from local sales offices regarding rayon goods to be manufactured in accordance with government specifications is Charles Lovett. [Tr. II, pp. 447-448, 620.] These men, along with John McEwen, then of the credit department, dealt with Mr. Mills within the limitations of their authority on behalf of Deering-Milliken.

Statement of Facts.

In the latter part of 1951 Mr. Mills was attempting to obtain a contract from the Ordnance Department of the United States Army for the manufacture of a large quantity of inner assembly liners for cartridge cases. The army requirements with respect to the cloth from which these cartridge case liners were to be manufactured by Mr. Mills were set forth in a detailed five page purchase description entitled PA-PD-29, wherein general specifications, requirements, sampling, inspection and test procedures are found.* [Pltf. Ex. 5.] Three of the requirements which become of importance here are that the cloth be of rayon, that the *finished* cloth be uniformly and closely woven and free of weighting materials, and that the cloth have an air permeability of 50 plus or minus 15 cubic feet per minute per square foot.

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*This is the same as specification PXS-1300. [Tr. I, pp. 82, 230; Tr. II, p. 627.]

As a part of his effort to obtain a government contract, Mr. Mills made inquiry in mid-December, 1951, of appellant for a price quotation on rayon cloth. This was the first contact between appellant and appellee. [Tr. I, pp. 74-77, 123-126.] At this time Mr. Mills was negotiating with the government for both 75 mm. and 105 mm. cartridge case liners and his inquiry for a price quotation consequently was general and related to several different widths of rayon cloth. Mr. Piersol referred this initial inquiry to appellant's New York office, as he had informed Mr. Mills he would do. [Tr. I, p. 156; Pltf. Ex. 18.] As a matter of routine Mr. Harris in New York referred the inquiry to Mr. Lovett. Mr. Lovett in turn checked with his company's fabric development department where he learned (1) that one of the mills represented by Deering-Milliken could manufacture *greige* goods which would meet the specification when finished, and (2) that the specification called for *finished* goods, free of weighting materials. [Tr. II, pp. 624-626.] After checking with the mill involved, the market price of the cloth was transmitted by Mr. Lovett to Mr. Piersol [Pltf. Ex. 19] who in turn transmitted the price quotation to Mr. Mills by telephone and, at Mr. Mills request, confirmed it by a letter dated January 10, 1952. [Tr. I, pp. 180-181; Pltf. Ex. 1.] The quotation was for *greige* goods, *as was every quotation ever transmitted to Mr. Mills by Deering-Milliken.* [Tr. I, pp. 341-349; Tr. II, pp. 446-448, 450-453; Deft. Exs. A and B.] To this point, it was clear to Mr. Mills that he did not have a contract with appellant. [Tr. I, pp. 178-181.]

Although he had no independent recollection of his first meeting with Mr. Piersol [Tr. I, pp. 162-164], Mr. Mills maintains that he inquired for goods which *when delivered* to him would meet specification PA-PD-29. [Tr. I, p. 76.] Moreover, he testified that he read these lengthy specifications to Mr. Piersol in great detail at the time of their initial contact. [Tr. I, pp. 79, 150-155.] The written record

of these first conversations, however, indicate that Mr. Mills asked for quotations on specification PA-PD-29 in *natural* or *unbleached* cloth. [Tr. II, p. 448; Pltf. Ex. 18.] Hindsight reveals that it was from this very beginning that a misunderstanding existed between the parties concerning the subject matter of their negotiations and the terms used by them.

Deering-Milliken deals only in rayon "greige" (pronounced "gray") goods, and that is well known to those who deal in textiles. [Tr. II, pp. 623-624, 690-691.] The term "greige" has a well defined and established meaning in the textile industry. It has *absolutely no connotation as to color,* but rather refers to all the physical characteristics of cloth as it comes off the loom, *i. e.,* cloth in its natural state. Greige goods are sometimes referred to as "natural" or "unbleached" goods. In contradistinction, "finished goods" are defined as goods which have been dyed, bleached, printed, or otherwise processed after they have been loomed. The process of finishing greige goods is called "converting." All of these terms are in every day use and elementary to the textile industry, and Mr. Piersol, Mr. Lovett and the other employees of appellant so understood and used then. [Tr. I, pp. 347-348; Tr. II, pp. 549-550, 620-622, 688-690.]

Dealing only in rayon greige goods, appellant interpreted Mr. Mills inquiry for a price quotation as one relating to greige goods which *when finished by Modern-Aire* would meet the specifications of PA-PD-29. [Tr. II, pp. 447, 625-627, 635-639, 672-682.] This was indicated in appellant's reply to the initial inquiry of Mr. Mills, as well as in all subsequent negotiations, for appellant always quoted rayon cloth in terms of "specification PA-PD-29 *in the greige.*" [Tr. I, p. 347; Pltf. Exs. 1, 2, 18 and 19.] In this connection, appellant knew that greige goods would not meet specification PA-PD-29 without finishing. However, there was nothing unusual about Mr. Mill's inquiry for greige goods per specification PA-PD-29 since appellant

was a greige goods house and since cloth in the greige state had to meet certain standards or else it would not meet specification PA-PD-29 even when finished. [Tr. II, pp. 626-627, 638, 677-679.]

Appellant further believed that Mr. Mills also understood that its quotations for "greige goods" as per PA-PD-29 related to cloth which when finished by Modern-Aire would conform to specifications PA-PD-29 [Tr. II, pp. 543-544, 637-639, 678-682], since all through the negotiations Mr. Mills and Mr. Piersol discussed only greige goods. [Tr. II, pp. 431, 434-436, 449, 545.] In this connection, Mr. Mills never once inquired as to the meaning of the term "greige" even though every price quotation relayed to him by appellant referred to "greige" goods.

On the other hand, Mr. Mills claims that his inquiry was for rayon cloth which did meet PA-PD-29. His misunderstanding of this situation was undoubtedly due either to his lack of knowledge of the elementary terms used in the industry in which he sought to engage or in particular to the meaning of the word "greige." Mr. Mills testified that *at the time of the negotiations here in question* he believed "greige" referred to the *color* of cloth rather than to all of its natural characteristics as it came off the loom or before it was finished or processed. [Tr. I, pp. 78-79, 165-178, 183-187.] He also admitted that price was his main concern and *that the fact that some of the replies received by him to his inquiries from other sources quoted on finished goods and others on greige goods* meant nothing to him. [Tr. I, pp. 182-187; Tr. II, p. 572.] It subsequently appeared that Mr. Mills was also unfamiliar with specifications PA-PD-29. [Tr. I, pp. 141-143, 155.]

This basic misunderstanding of the parties did not become apparent until late in March, 1952, although appellant in all of its negotiations with Mr. Mills always quoted goods "in the greige." [Tr. II, pp. 572-573.] Even though he now claims he did not fully understand the terms used

in the textile industry or the purport of PA-PD-29, Mr. Mills by his own testimony made no attempt to seek advice with respect to their meaning. [Tr. I, p. 142.]

When Mr. Mills received the January 10 price quotation he requested that it be held open for 30 days. This was refused and Mr. Piersol informed Mr. Mills that the rayon mills would not commit themselves on a price over an extended period of time. [Tr. I, pp. 194-196, 218; Tr. II, pp. 453-454, 456; Deft. Exs. C and D.]

After this initial quotation, further negotiations continued between Mr. Mills and appellant. In response to new inquiries by Mr. Mills, appellant's Los Angeles office on January 16, 1952 confirmed in writing price quotations on 45½" and 42½" cloth on specification PA-PD-29 *in the greige*. [Tr. I, pp. 80, 196-197; Tr. II, pp. 459-463; Pltf. Ex. 2.] This confirmation did not occur, however, until after Mr. Mills' inquiry had been referred to New York. [Def. Exs. E, F and G.] Mr. Mills again acknowledges that these inquiries and quotations did not amount to a contract. [Tr. I, p. 199.]

Within a few days after receipt of the quotation on the 45½" and 42½" cloth, Mr. Mills continued negotiating as to price and made another inquiry, this time relating to 47½" cloth. [Tr. I, pp. 197-200, 203-205.] After transmitting this inquiry to its New York office and receiving a reply [Deft. Exs. H and I], appellant's Los Angeles office on February 8, 1952, quoted a price to Mr. Mills in writing on the 47½" cloth. [Pltf. Ex. 3.]

During his negotiations with appellant, Mr. Mills also negotiated with the government. At the beginning of February, 1952, the government decided to consider Modern-Aire only for the manufacture of 105 mm. cartridge case liners, and in response Mr. Mills claims he sought and obtained from the government a higher price committment per unit on this smaller proposal than he had obtained on the larger proposal which included both 75 mm. and 105 mm. liners. [Tr. I, pp. 131-132, 202-203, 221.]

Mr. Mills contends that he next conferred personally with Mr. Piersol on February 6, 1952, after being informed by the government that he was being considered only for a contract on 105 mm. cartridge liners. At this time Mr. Mills claims he personally went over the blueprints and specifications for the 105 mm. liners [Pltf. Exs. 4 and 5] in great detail with Mr. Piersol. [Tr. I, pp. 81-86, 200-201.] Mr. Piersol, however, had absolutely no recollection of such a meeting with Mr. Mills [Tr. II, pp. 466-468] and in fact testified that he was in New York at the time of this alleged meeting. [Tr. II, pp. 461, 545.] The documentary evidence presented at trial corroborated Mr. Piersol in this regard and indicated that between January 16, 1952, and February 19, 1952, Mr. Mills dealt only with Henry Kramer, Mr. Piersol's assistant. [Pltf. Exs. 2 and 3; Deft. Exs. H and I.] It thus appeared that Mr. Pierson had never seen the blueprints or specifications until after the dispute with appellee arose.

It was not until February 19, 1952, that Mr. Mills again dealt with Mr. Piersol, at which time Mr. Mills sought a better price on the 47½" cloth. [Tr. II, pp. 350-356, 469-470.] After Mr. Piersol contacted New York, the quoted price on 125,000 yards of this cloth was reduced from 39¾ cents to 38½ cents. [Pltf. Exs. 20 and 21.] Shortly thereafter Mr. Mills sought a similar price reduction on the 45½" cloth previously quoted in January, having then apparently decided he could best utilize a combination of 47½" and 45½" widths. [Tr. II, pp. 470-472; Deft. Ex. J.] Deering-Milliken's reply was delayed pending confirmation by Mr. Mills that the government would give him a 90% partial payment clause in his proposed contract with the government. [Tr. II, pp. 474-475; Deft. Ex. K.] This clause provided that the government would advance Modern-Aire money to pay for material and labor expenses as they were incurred rather than upon delivery of the finished product by Modern-Aire. [Tr. I, pp. 234-235.]

Mr. Mills had no recollection of any further conversations or meetings prior to March 6, 1952 [Tr. I, pp. 222-226], but the evidence showed conclusively that substantial negotiations continued between the parties during the period of March 3 to March 5, 1952. [Tr. II, pp. 356-358, 365-370, 373-375, 381-383, 386-393, 476-479, Pltf. Exs. 22, 23, 24, 25 and 26.] Although several matters were discussed at this time, all items were left open for further negotiation. [Tr. II, pp. 356-362.]

On March 6, 1952, Mr. Mills went to Mr. Piersol's office and informed him that the government had given its oral assurance that Modern-Aire would get a contract for 105 mm. liners as soon as Mr. Mills presented evidence that he had access to a source of supply of rayon fabric. As an accommodation to Mr. Mills, Mr. Piersol called a Mr. Burns of the government's Ordnance Department and told him that rayon fabric in the greige was available to Mr. Mills. At Mr. Mills' request, Mr. Piersol also wrote two letters to Modern-Aire under the date of March 6, 1952. [Tr. I, pp. 88-92, 227-228; Tr. II, pp. 395-402.] The first stated in part:

> ". . . we have consummated a contract with you for 101,200 yards of 45½" rayon cartridge cloth in the greige as per government specification PXS-1300 and also for 23,900 yards of the same material in 47½" width. . . . This memo is written with the idea of submitting (it) to the Government Procurement Office. . . ." [Pltf. Ex. 6.]

This letter made no mention of price, and Mr. Piersol testified that the particular language used was suggested by Mr. Mills since it was prepared solely for submission to the government. [Tr. II, pp. 395, 403-404, 510-511.]

The other letter was written for Mr. Mills and provided in part:

> ". . . This will confirm our quotation to you of today on 101,200 yards of 45½" rayon cartridge cloth in

> the greige as per Specification PXS-1300 at 36⅛¢ per yard and 23,900 yards of the same material in 47½" width in the greige at 37⅜¢ per yard, . . . We are teletyping your order for these goods to our home office tonight subject to your receipt of the contract from the government; and, of course, the whole thing is predicated on our ability to handle the business when you are in a position to confirm it. . . ." [Pltf. Ex. 7.]

Both of these letters quote rayon cloth "in the greige."

Mr. Piersol testified that neither of these letters were intended by him to evidence a contract with Modern-Aire but rather were written at Mr. Mills' request as an indication to the government that rayon cloth in the greige was available to Modern-Aire. [Tr. II, pp. 396, 403, 510-514.] In this connection, Mr. Mills admitted that all the government requested was evidence that he was "able" to secure rayon goods [Tr. I, pp. 222, 236], and he claims to have shown *both* letters to the government. [Tr. I, pp. 93-94.]

Mr. Mills contends that there was a "meeting of the minds" on March 6 and that the letters of March 6th constitute an enforceable contract [Tr. I, pp. 214-215, 228-229]; however, extended negotiations between the parties from March 6 to March 14 with respect to the terms of delivery, the width and quantity of the cloth to be supplied, credit and other essential terms indicate that the letters of March 6th were not intended by either of the parties to constitute a contract. During this period, Mr. Mills unilaterally determined that it would be more efficient and would avoid confusion if he dealt with only one width of cloth. He consequently changed both the quantity and widths discussed on March 6th from a total of 125,100 yards of 45½" and 47½" to 126,000 yards of 45½" minimum width. [Tr. I, pp. 129-131, 229, 260, 263-265.] Notwithstanding the language of the March 6th letters

that delivery was to start "April 25th and spread out to completion" and his contention that these letters amounted to a definite agreement, Mr. Mills admitted that the specific delivery dates were left open for future decision since they were of vital importance to all concerned. In fact, negotiations with respect to delivery continued as late as March 18, 1952. [Tr. I, pp. 229-230, 243-245, 260; Tr. II, pp. 518, 530-531; Deft. Exs. L, P, Q and R.]

It was also during this period of March 6 to March 14 that negotiations in regard to credit took place. [Tr. I, pp. 233-235, 256.] Indeed, appellant would not enter into any agreement with Mr. Mills unless he could establish his credit and so informed Mr. Mills on March 7, 1952. [Tr. II, p. 517; Deft. Ex. M.] On March 10, 1952, Mr. Mills told Mr. Piersol that he had received an advance copy of his contract with the government. At this time Mr. Piersol advised Mr. Mills to call John M. McEwen, appellant's assistant credit manager in New York, in order to establish the necessary credit arrangements. [Tr. I, pp. 94, 254-255; Tr. II, pp. 406-407, 656.] Although his memory was quite vague as to when he called and as to whom he called, Mr. Mills remembered specifically that he explained his 90% partial payment clause to appellant's New York credit man and obtained an approval on terms of net 30 days provided he made a payment of 10% of the total price of the cloth in advance. [Tr. I, pp. 94-95, 234-235, 335-337.]

At the trial Mr. Mills asserted that the required 10% related to an advance "payment" on the claimed executed contract of March 6th which was to be paid upon request rather than as a deposit as security for his performance of a contract which might be made in the future. [Tr. I, pp. 247-248.] In fact, Mr. Mills denied that he even discussed that a formal written contract was to be executed after all negotiations had been completed. [Tr. II, p. 569.] The documentary evidence presented at trial, however,

indicates not only that Mr. Mills knew a formal written contract was yet forthcoming but also that the 10% amount was for security purposes only—in lieu of a letter of credit. [Tr. II, pp. 531, 658-661; Pltf. Ex. 8, Deft. Exs. N, U, V and W.]

Somewhere between March 12 and March 14, Mr. Mills received and signed his contract with the United States [Tr. I, pp. 105-107; Pltf. Ex. 12.] This is the only government contract involved in this case. [Tr. I, pp. 132-133.]

On March 14, 1952, Mr. Piersol, pursuant to Mr. Mills instructions, prepared a "Memorandum of Order" which was entirely changed from the terms mentioned in the letters of March 6th. It differed not only in quantity and widths ordered and delivery dates and credit terms specified but also included detailed shipping instructions and references to what "seconds" were acceptable, matters not mentioned in the March 6th letters. [Pltf. Ex. 8.] Mr. Piersol sent a copy of this order to New York so that a formal "Salesnote" might be prepared if the order was accepted by the mill involved. [Tr. II, pp. 527, 643-644; Deft. Ex. N.] A copy of the order was also sent to Mr. Mills. [Tr. I, pp. 95, 268.] Mr. Mills admits receiving and reading this order. He also admits that he made no objection whatsoever to any of its terms with the one exception that he called a typographical error as to price to the attention of Mr. Piersol. In particular, he made no objection to the words "This order is subject to acceptance or rejection by our mill. This order is subject to the provisions of our Salesnote." or to the words "Net 30 days—10% deposit with contract." [Tr. I, pp. 268-270; Tr. II, pp. 525-526; Deft. Ex. O.]

Notwithstanding his lack of objection to the content of the March 14th order, his extensive negotiations from March 6 to March 14 and the utter difference between the letters of March 6th and the order of March 14th,

Mr. Mills contends that the March 14th order was merely a confirmation of the contract evidenced by the March 6th letters. [Tr. I, p. 212.] Under cross-examination, however, Mr. Mills referred to the March 6th letters as *orders* only and admitted that on March 14 he called and told Mr. Piersol that he had received and signed the government contract and that Mr. Piersol could *now* send in his *order*. [Tr. I, pp. 259-260.] Mr. Mills further admitted that it wasn't until March 14 that he gave Mr. Piersol definite information with respect to the quantity, widths, delivery, shipping and credit which he ultimately decided he wanted. [Tr. I, pp. 260-262.] These admissions corroborated Mr. Piersol's testimony that at no time prior to March 14 did Mr. Mills ever contend that he had given a positive order, let alone a firm contract, to appellant, and that he received his first authorization from Mr. Mills to submit a written order on March 14. [Tr. II, pp. 406, 519-521, 525.]

Prior to this time the government requested Mr. Mills to manufacture a "pilot lot" (sample lot) of 100 cartridge liners, and Mr. Mills asked Mr. Piersol to obtain 50 yards of cloth for this purpose. [Tr. I, pp. 147-148, 203, 257.] Appellant was unable to furnish this material without special processing since it dealt only in greige goods. However, 50 yards of "finished" cloth were obtained and sent to Mr. Mills on March 18, 1952. At this time Mr. Piersol explained to Mr. Mills that this was not a sample of the cloth he had ordered, and Mr. Mills acknowledged that he was buying "greige" goods rather than "finished" goods. [Tr. I, pp. 272-274; Tr. II, pp. 531-532, 546; Deft. Exs. S and T.]

In the meantime, the Memorandum of Order dated March 14 had been received in appellant's New York office. Before appellant would recommend that the mill accept this order or prepare a formal written contract, New York advised Mr. Piersol that they expected Mr.

Mills to forward his check for 10% of the cost of the goods ordered as evidence of his good faith. [Tr. II, pp. 532-533; Deft. Exs. U and W.] In response Mr. Piersol requested of and received from Mr. Mills on March 20 the required check [Tr. I, pp. 96-98, 270, 335-336, 534-535; Pltf. Ex. 9] and gave Mr. Mills a receipt therefor. [Pltf. Ex. 10.] The check was then sent to New York. [Tr. II, pp. 412-417; Pltf. Exs. 29 and 30.] It was never deposited by appellant and was later returned to Mr. Mills. [Tr. I, pp. 270-271, 274.]

During this time New York also advised Mr. Mills that his March 14th order could not be accepted since negotiations had extended for so long a time that the delivery dates requested were no longer available. Mr. Mills authorized different shipping methods and this hurdle was abolished. [Tr. II, pp. 530-531; Deft. Exs. P, Q and R.] However, by March 21, 1952 and before the March 14th order was accepted or a formal contract prepared, it became apparent for the first time to Mr. Lovett of appellant's New York office that Mr. Mills, either through lack of knowledge of textiles and textile terminology or of specification PA-PD-29 itself, believed that the "greige" goods being offered by appellant's mill would meet specifications without further processing by Modern-Aire. [Tr. II, pp. 645, 648-649; 652-653.] In order to clear up any mistaken belief, Mr. Lovett immediately wired Mr. Piersol that the cloth in the greige ordered by Mr. Mills would not meet the specification until "finished" and instructed the Los Angeles office to clarify the mixup and make every effort to conclude the sale of goods as offered. [Tr. II, pp. 683-686; Pltf. Ex. 11.] Mr. Mills and Mr. Piersol interpreted this wire as informing that there would be a delay in the first shipment only. [Tr. I, pp. 98-101, 278-282; Tr. II, pp. 423-426, 535-537.] As a result Mr. Mills sought to have the delivery date for the first shipment of his liners extended by the gov-

ernment, but the government advised that it would be more expeditious if Mr. Mills sought the cloth necessary for his first delivery of liners from another source. [Tr. I, pp. 101-103, 282-283; Tr. II, pp. 428, 538-539.]

Thereafter, Mr. Piersol called Mr. Lovett in New York who clarified appellant's position that New York always knew its greige goods would not meet PA-PD-29 unless finished but believed Mr. Mills had been negotiating for greige goods which he intended to finish or have finished. In his wire to Mr. Piersol, Mr. Lovett made specific reference to the air permeability of greige cloth in order to emphasize to Mr. Piersol, who was not familiar with specification PA-PD-29, and to Mr. Mills the difference between greige goods and finished goods insofar as that specification was particularly concerned. It was Mr. Lovett's hope that even if there had been a misunderstanding, Modern-Aire would still find it to its interest not to cancel its order for greige goods. [Tr. II, pp. 537-538, 625-626, 652-653, 685-686.]

On March 25, 1952, Mr. Piersol in writing demanded that Modern-Aire accept greige goods as ordered or else appellant would consider the order cancelled. [Tr. II, pp. 539-540; Deft. Ex. X.] To this Mr. Mills responded through his attorneys that he had a binding contract for 126,000 yards of finished goods which met PA-PD-29. [Tr. II, pp. 541-542; Deft. Ex. Y.]

Thereafter Mr. Mills advised the government of the situation [Tr. I, pp. 103-104] and sought the help of Howard B. Drake who was in charge of expediting and employed by the government to help the contractor. [Tr. II, pp. 482, 501.] In hope of clarifying the matter, Mr. Drake called Mr. Harris and made a report to Washington [Tr. II, pp. 483, 485, 488], which was based exclusively on information furnished by Mr. Mills after he had consulted with his attorney. [Tr. II, pp. 499-500, 503.]

After the March 21 developments Modern-Aire did not go forward and try to meet its government contract either by purchasing greige goods and processing them further to meet government specifications or by obtaining finished cloth from other firms. While Mr. Mills testified that he attempted to procure the necessary fabric elsewhere [Tr. I, p. 104], he subsequently admitted that he made no actual effort to obtain finished goods [Tr. I, p. 315] other than to seek quotations from three outside firms. [Pltf. Exs. 15 and 16; Deft. Ex. Z.] *One reply quoted a price for the total yardage required by Modern-Aire which exceeded the price quoted by Deering-Milliken by only $722.50.* [Deft. Ex. Z.] Mr. Mills admitted further that he knew that Deering-Milliken's greige goods would meet specification PA-PD-29 if they were "scoured" and that this process cost but 3¢ a yard. [Tr. I, p. 313.] It is uncontradicted that there were many local concerns easily reached by telephone which were equipped to scour cloth. [Tr. II, pp. 692-693.]

On June 2, 1952 Mr. Mills received notice that the government was terminating its contract with Modern-Aire, not only for Modern-Aire's inability to complete the contract, *but also for its failure to submit a pilot lot.* [Tr. I, p. 110; Pltf. Ex. 14.] On July 8, 1952 the government advised Modern-Aire that it had procured the necessary liners elsewhere at a higher price and demanded payment of $4,100.66. [Tr. I, p. 107; Pltf. Ex. 13.] Notwithstanding that neither Mr. Mills nor Modern-Aire has ever paid this sum [Tr. I, p. 110] and notwithstanding that the United States has not proceeded in any other manner to either demand or collect this sum, Modern-Aire, in the within action, seeks to recover this amount as part of its alleged damages. Modern-Aire also seeks to recover its estimated future profits claimed to have been lost on the government contract.

The district court agreed with the contention of Modern-Aire that it had entered into a contract with appellant on

March 6, 1952, and found that the letters written by Mr. Piersol on that date constituted an enforceable written agreement. [Findings of Fact* pars. I, II and III; Tr. I, pp. 25-26.] Accordingly it gave judgment in favor of Modern-Aire for the total amount of $8,522.26. [Tr. I, pp. 33-35.] This amount consisted of the sum of $4,421.60 as compensation for appellee's estimated loss of profit and the sum of $4,100.66 to be held in trust for the United States. It is from this judgment which your appellant respectfully appeals.

Specification of Errors.

The errors relied upon and urged by appellant herein are as follows:

1. The finding that on March 6, 1952 appellant and appellee entered into a written contract for the purchase and sale of 126,000 yards of rayon cartridge cloth which was to conform to military specifications designated as PA-PD-29 is conflicting with the other findings of fact and not supported by the evidence. [FF. pars. I and II, Tr. I, pp. 25-26.]

2. The finding that the contract found between appellant and appellee consisted "of two letters written by the defendant to the plaintiff, which said two letters are in evidence as plaintiff's Exs. 6 and 7" is conflicting with the other findings of fact and not supported by the evidence. [FF. par. III, Tr. I, p. 26.]

4. The finding that plaintiff's Exhibit 8, designated Memorandum of Order, was prepared by appellant for the purpose of confirming the fact that a contract had been entered into on March 6, 1952 between appellant and appellee and for the further purpose of confirming certain terms and conditions contained in said contract is con-

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*Hereinafter abbreviated "FF."

flicting with the other findings of fact and not supported by the evidence. [FF. par. IV, Tr. I, p. 26.]

5. The following findings are insufficient and not supported by the evidence, to wit: that the cost to appellee of manufacturing the inner assembly liners in accordance with the provisions of its contract with the United States was the sum of $66,304.88 [FF. par. V, Tr. I, pp. 26-27]; that the total price which the United States promised to pay appellee pursuant to said contract was the sum of $70,725.98 [FF. par. VI, Tr. I, p. 27]; that pursuant to said contract with the United States plaintiff was entitled to or would have realized a profit of $4,421.60, and that plaintiff has sustained damage in said amount. [FF. pars. VII and XV, Tr. I, pp. 27, 29-30.]

6. The evidence is insufficient to support the finding that the profit anticipated by appellee was reasonably within the knowledge and contemplation of appellant at all times pertinent herein. [FF. par. I *re:* Compl. par. XXI, Tr. I, p. 13.]

7. The evidence and findings are wholly insufficient to establish that the United States in fact suffered damages in the sum of $4,100.66 as a result of the breach of the contract found between appellant and appellee. [FF. par. XVI, Tr. I, p. 30.]

8. There is absolutely no evidence to support the finding that the United States will, in due course, proceed against the appellee to enforce payment of the sum of $4,100.66. [FF. par. I *re:* Complt. par. XXVII.]

9. The Conclusions of Law [Tr. I, p. 32] are conflicting between themselves and do not support the judgment entered herein that appellee recover the sum of $4,100.66 from appellant, to be held by appellee as trust money for the use and benefit of the United States and immediately upon receipt by appellee be remitted to the United States.

ARGUMENT.

I.

The Findings of Fact With Respect to the Existence of a Contract Are Insufficient, Inconsistent and Conflicting and Not Supported by the Evidence.

Appellant realizes that in order to reverse a judgment on the ground that the evidence is insufficient to support the findings of fact, it must be shown on appeal that there is no substantial evidence in the record which would permit the trier of fact to make such findings. Appellant is also aware of the rule that the appellate court will view the evidence in the light most favorable to the appellee, will indulge in all legitimate inferences in favor of the trier of fact, and will not weigh the evidence. But as was pointed out in *Herbert v. Lankershim,* 9 Cal. 2d 409, 71 P. 2d 220 (1937), at p. 471:

> "This rule, however, does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence."

And as was said in *Fewel & Dawes, Inc. v. Pratt,* 17 Cal. 2d 85, 100 P. 2d 650 (1941), at page 89:

> "If, however, the evidence is so slight and tenuous that it does not create a real and substantial conflict the finding may be set aside."

For whatever may have been the rule heretofore as to what evidence is necessary to support a plaintiff's case, it is now well settled that it must be supported by substantial evidence, and that whether or not there is substantial evidence is a question of law for the court. While an appellate court must accept the facts tending to support the judgment as true, yet when the question of their

having sufficient substance to support the plaintiff's case comes in issue, it becomes a question of law alone, as applied to the peculiar facts of the case. (*Guardianship of Sturges,* 30 Cal. App. 2d 477, 497, 86 P. 2d 905 (1939).)

A. The Evidence Is Wholly Insufficient to Support the Finding that Appellant and Appellee Entered into a Written Contract on March 6, 1952.

The district court found that on March 6, 1952 appellant and appellee entered into a written contract pursuant to which appellant agreed to manufacture and deliver 126,000 yards of rayon cartridge cloth which conformed to military specification PA-PD-29. [FF. pars. I and II, Tr. I, pp. 25-26.] Further, this written contract was found to consist of two letters in evidence as Plaintiff's Exhibits 6 and 7.* [FF. par. III, Tr. I, p. 26.] Appellant respectfully submits that neither of these findings are supported by the evidence presented in this case. In this connection, the testimony of Mr. Mills to the effect that "I had an agreement" or that "They understood there was a contract" must be disregarded, for as was specifically held in *Nevills v. Moore Mining Co.,* 135 Cal. 561, 67 Pac. 1054 (1902), such statements are merely conclusions and not competent evidence to support a finding of the existence of a contract.

Accord:

Townsend v. Flotill Products, Inc., 82 Cal. App. 2d 863, 866, 187 P. 2d 466 (1947).

That there was no "meeting of the minds" of the parties and no mutual assent to contract on March 6, 1952 is shown in at least two ways, for the evidence proves conclusively not only that neither of the parties consented to or intended to be bound by a contract on that date but also that the parties did not agree upon the same thing in the same sense.

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*As this case turns upon these documents, they are set forth verbatim in the Appendix hereto as No. 1 and No. 2.

1. The Evidence Shows Conclusively That Appellant Did Not Consent to Be Bound by Contract or Intend to Enter into an Agreement on March 6, 1952.

It is elementary that before a contract may be found to exist it must be shown that there has been an exchange between the parties of a definite offer for an unconditional acceptance. This is so because a contract is a consensual arrangement based on the mutual assent of the parties. The principle was stated well by the court in *Mahar v. Compton,* 45 N. Y. Supp. 1126, 79 N. Y. State Rep. 1126 (1897) in the following words appearing in its opinion at page 1128:

> ". . . there must have been an exact meeting of minds of the contracting parties in respect to every detail of the proposed contract; and if the precise thing offered was not accepted, or if the acceptance was in any manner qualified by conditions or reservations, however slight they may have been, the universal rule seems to be that no valid contract is thereby established, but that such a modified or qualified acceptance must rather be treated as a rejection of the offer."

Based on the assent of the parties, mutual consent is absolutely necessary to the existence of a contract. *California Civil Code, Sections* 1550(2) and 1565.

Sackett v. Starr, 95 Cal. App. 2d 128, 133, 212 P. 2d 535 (1949);

Cumming v. Ross, 90 Cal. 68, 71, 27 Pac. 62 (1891);

Marx & Rawolle v. Standard Soap Co., 42 Cal. App. 32, 183 Pac. 225 (1919);

12 Cal. Jur. (2d), *Contracts,* Section 18, p. 208.

The court in *McClintock v. Robinson,* 18 Cal. App. 2d 577, 64 P. 2d 749 (1937) reversed a judgment based on a finding that plaintiff had "purchased" a cabin from the defendant for the reason that there was no evidence

to support such finding. In so doing, the court, at page 582, approved the following language appearing in 6 *Cal. Jur.,* page 41:

> "Mutual consent is necessary to the existence of any contract. Assent of at least two minds to each and all of the essentials of the agreement is required; and it is only upon evidence of such assent that the law enforces the terms of a contract or gives a remedy for a breach of it. One cannot be made to stand on a contract to which he never consented."

When the foregoing rules are applied to the uncontroverted facts of this case it is immediately apparent that one of the elements of a valid contract is lacking. Appellant vigorously urges that on March 6, 1952 there was no mutual assent—no meeting of the minds—and therefore no contract between appellant and appellee.

The trial court found that two letters written by Mr. Piersol on March 6, 1952, in evidence as Plaintiff's Exhibits 6 and 7, constituted a binding contract between the parties. [FF. pars. I, II and III, Tr. I, pp. 25-26.] That there is no evidence to support such a finding is best shown by the letters themselves, neither of which ever came to the attention of appellant's New York office until after Mr. Mills' attorneys threatened legal action. The language used in each indicates conclusively that neither was intended to evidence a binding agreement.

Mr. Piersol's only purpose in writing the letter designated as Plaintiff's Exhibit 6 was to assist Mr. Mills in obtaining a 90% partial payment clause in his contract with the government and to indicate to the government that rayon cloth in the greige, under the circumstances then existing, was available to Modern-Aire. This is clear by its very terms, for as the last sentence expressly states, "This memo is written with the idea of submitting (it) to the Government Procurement Office." Furthermore, the important omission of any mention of the *price* of the

goods therein not only affirms that this letter was not intended by the parties to evidence a binding agreement between them but also demonstrates that this letter alone as a matter of law cannot constitute a contract since its terms are incomplete and uncertain as to price.

Schimmel v. Martin, 190 Cal. 429, 213 Pac. 33 (1923).

As was said by the court in *Talmadge v. Arrowhead R. Co.,* 101 Cal. 367, 35 Pac. 1000 (1894) at page 371:

> "It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject matter and parties."

Plaintiff's Exhibit 7, written at the same time as the above letter, is further confirmation that the alleged "contract" was in fact not intended by anyone to be a contract. The first paragraph of this letter adopts the same language as all the other replies to inquiries for quotations made by Mr. Mills during the preceding three months [see Pltf. Exs. 1, 2 and 3], being merely a written confirmation of the latest price quotation to Mr. Mills. Mr. Mills admitted that these prior written confirmations using the same language were not intended as a contract. [Tr. I, pp. 178-181, 199.]

Moreover, the second paragraph of this letter shows on its face that it is nothing more than an acknowledgment of Mr. Mills' "order" for cloth which was being relayed to appellant's home office in New York. An "order" is in no sense a contract or evidence of a contract, rather it is merely an offer to purchase.

Imported Liquors Co. v. Los Angeles Liquor Co., 152 F. 2d 549 (9th Cir., 1946);

Stein-Gray Drug Co. v. Michelsen, 116 N. Y. Supp. 789, 794 (1909);

Waxelbaum v. Schloss, 116 N. Y. Supp. 42 (1909).

Finally, the closing portion of the letter shows that at the time these letters were written, the minds of the parties had not met, for it provides, ". . . and, of course, the whole thing is predicated on our ability to handle the business when you are in a position to confirm it." To enforce the March 6th letters as an obligation of the parties is to completely ignore the import of these words. By necessary implication Mr. Mills had not then confirmed or given his final assent to the order. So too, appellant was left free to accept or reject the order, when, in the future, Mr. Mills was in a position to confirm it.

The language used in this letter is very similar to that interpreted in *Peerless Glass Co. v. Pacific Etc. Co.,* 121 Cal. 641, 54 Pac. 101 (1898). In that case the seller executed and delivered to the buyer a writing which provided in part as follows: "We have decided . . . to sell you another 500 gross upon the same terms and prices if notified on or before May 1st, conditionally, if we have the ware to sell at that time." The seller refused to deliver any of the goods referred to in this writing although notified by the buyer prior to May 1st. The court held not only that the language used was insufficient to show a binding agreement between the parties but also that the language used was conditional and that the seller was not bound unless it was also shown that the condition upon which the seller agreed to deliver the goods existed. In the case at bar it has not even been shown that the terms of the March 6th letters were confirmed, let alone that the conditions existed that appellant was able to handle the business.

See also:

Booth v. A. Levy & J. Zentner Co., 21 Cal. App. 427, 131 Pac. 1062 (1913);

Patch v. Anderson, 66 Cal. App. 2d 63, 151 P. 2d 644 (1944);

Restatement of Contracts, Section 25 (Appendix No. 3).

That the two letters of March 6, 1952, were not and were not intended to be a contract even for greige goods is also plainly shown by the testimony of Mr. Mills and Mr. Piersol concerning the circumstances surrounding the writing of these documents. On March 6, 1952, Mr. Mills went to Mr. Piersol's office and informed him tht the government had given its oral assurance that Modern-Aire would get a contract for 105 mm. liners as soon as Mr. Mills presented evidence that he had access to a source of supply of rayon fabric. At this time Mr. Mills was having difficulty in convincing the government that he could even obtain the goods from which he hoped to manufacture the cartridge case liners. As an accommodation to Mr. Mills and with a natural desire to cooperate in the hope of eventually securing a firm order from him, Mr. Piersol dictated the letters here in question. [Tr. I, pp. 88-92, 227-228; Tr. II, pp. 395-402.] This was done at the request of Mr. Mills and the particular language used was that suggested by Mr. Mills. [Tr. II, pp. 395, 403-404, 510-511.]

Mr. Piersol testified that neither of these letters were intended by him or Mr. Mills to evidence a contract with Modern-Aire but rather were written at Mr. Mills' request as an indication to the government that rayon cloth was available to Modern-Aire. [Tr. II, pp. 396, 403, 510-514.] At first Mr. Mills maintained that Army Ordnance wanted evidence that Modern-Aire had definitely obligated itself to purchase the necessary cloth before Modern-Aire would finally be considered for a government contract. [Tr. I, pp. 88-92, 227-228.] This position was obviously untenable since it was clear that the United States would not demand that persons who seek to contract with it irrevocably commit themselves to others before actually receiving a government contract. Finally, after extended cross-examination, Mr. Mills admitted that all the government requested was evidence that he was "able" to secure rayon goods. [Tr. I, pp. 222, 236.] More important, Mr. Mills claims

to have shown *both* letters to Army Ordnance [Tr. I, pp. 93-94], which, if true, indicates that even the government knew that no binding commitment had been made to or by appellant.

The law is settled that a writing which on its face purports to be a contract is nevertheless of no legal effect where it is shown that neither of the parties intended the document to constitute an obligation. Moreover, this lack of intent may be shown by parol evidence even though the writing was meant to influence third persons.

P. A. Smith Co. v. Muller, 201 Cal. 219, 256 Pac. 411 (1927);

New York Trust Co. v. Island Oil & Transport Corporation, 34 F. 2d 655 (2d Cir., 1929);

Buckner v. Leon & Co., 204 Cal. 225, 267 Pac. 693 (1928);

Texas Co. v. Berry Garage, 121 Cal. App. 455, 9 P. 2d 241 (1932).

Such are the facts now before this Court as demonstrated by the uncontroverted evidence above referred to.

It should also be noted that at the time these letters were written, Mr. Mills admitted both that he had not yet received the government contract [Tr. I, pp. 105-107] and that he had not entered into a contract with any of his other suppliers. [Tr. I, pp. 259-260.]

Apart from the very letters here in dispute and the circumstances surrounding their creation, the measure of the existence of a contract is the outward manifestations of the parties themselves. In the case at bar the undisputed conduct of the parties shows without doubt that neither appellant nor appellee mutually assented to be bound on March 6, 1952. Mr. Mills not only *continued to negotiate with Mr. Piersol for at least eight days after the March 6th letters were written* but also admitted that on March

14, 1952 he called Mr. Piersol and told him that the government contract had been signed and that Mr. Piersol could "now" send in Modern-Aire's "order." [Tr. I, p. 259.]

During the period from March 6 to March 14, 1952, Mr. Mills and Mr. Piersol continued to negotiate with respect to each and every term except price contained in the March 6th letters, as well as with respect to many terms not even mentioned in the letters but which were considered to be essential by both parties. In the first place, it was during this period that Mr. Mills ultimately determined in his own mind that it would be more efficient and would avoid confusion if he dealt with only one width of cloth. He consequently changed both the quantity and widths discussed on March 6th from a total of 125,100 yards of 45½" and 47½" cloth to 126,000 yards of 45½" minimum width cloth. [Tr. I, pp. 129-131, 229, 260, 263-265.]

In the second place, Mr. Mills admitted that on March 6, 1952 specific delivery dates were left open for future decision since they were of vital importance to all concerned. The evidence shows that in fact negotiations with respect to delivery continued as late as March 18, 1952. [Tr. I, pp. 229-230, 243-245, 260; Tr. II, pp. 518, 530-531; Deft. Exs. L, P, Q and R.]

It was also during this period that negotiations with regard to credit took place. [Tr. I, pp. 233-235, 256.] Indeed, appellant would not enter into any agreement with Mr. Mills unless he could establish his credit and so informed Mr. Mills on March 7, 1952. [Tr. II, p. 517; Deft. Ex. M.] After receiving this information, Mr. Mills called Mr. McEwen of appellant's credit department in New York. [Tr. I, pp. 94-95, 234-235, 335-337.] While the evidence is conflicting as to what exactly was said by Mr. Mills and Mr. McEwen, the only written memorandum of this conversation indicates that Mr. Mills

told Mr. McEwen that he was going to place an order with Mr. Piersol *sometime in the future* and that Mr. Mills agreed to make a 10% deposit at the time the order was made. [Tr. II, p. 659.] The other evidence presented at trial also shows that Mr. Mills knew a formal written contract was yet forthcoming. [Tr. II, pp. 531, 658-661; Pltf. Ex. 8; Deft. Exs. N, U, V and W.] Moreover, Mr. Mills affirmatively testified that he understood that it was necessary to submit a firm order in writing and that it was also necessary for the acceptance of that order to be in writing. [Tr. I, p. 208.]

Finally, the conduct of the parties on or about March 14, 1952 corroborate the fact that the March 6th letters were not intended or considered by either party to constitute a contract. It was on March 14, 1952 that Mr. Mills finally received and executed his written agreement with the government. [Tr. I, pp. 105-107; Pltf. Ex. 12.] He immediately contacted Mr. Piersol and, by his own testimony, advised Mr. Piersol that he was *now* ready to place an order with Deering-Milliken. [Tr. I, pp. 259-262.] Pursuant to Mr. Mills instructions, Mr. Piersol prepared a written "Memorandum of Order" which was entirely changed from the terms mentioned in the letters of March 6th. It differed not only in quantity and widths ordered and delivery dates and credit terms specified but also included detailed shipping instructions and reference to what "seconds" were acceptable, matters not mentioned in the March 6th letters. [Pltf. Ex. 8.] Mr. Piersol sent a copy of this order to New York [Tr. II, pp. 527, 643-644; Deft. Ex. N] and a copy to Mr. Mills. [Tr. I, pp. 95, 268.] Mr. Mills admits receiving and reading this order. He also admits that he made no objection whatsoever to any of its terms with the one exception that he called a typographical error as to price to the attention of Mr. Piersol. In particular, he made no objection to the words "This order is subject to acceptance or rejection by our mill. This order

is subject to the provisions of our Salesnote." or to the words "Net 30 days—10% deposit with contract" which would have been prepared if appellant had accepted this order. [Tr. I, pp. 268-270; Tr. II, pp. 525-526; Deft. Ex. O.]

In view of the very language contained in the March 6th letters, the circumstances surrounding their creation and the subsequent conduct of the parties, appellant submits that neither appellant nor appellee consented to be bound by contract or intended to enter into an agreement on March 6, 1952. Consequently, the district court's finding that the March 6th letters constituted a binding contract between the parties is not supported by the evidence.

2. The Evidence Shows Conclusively That Appellant and Appellee Did Not Agree Upon the Same Thing in the Same Sense.

Even assuming for the purpose of argument that the evidence is sufficient to show that on March 6, 1952 there was an exchange of a definite and certain offer for an unequivocal acceptance between appellant and appellee, still the evidence is insufficient to support the trial court's findings that appellant and appellee entered into a contract for the purchase and sale of rayon cartridge cloth which was to conform to military specifications designated as PA-PD-29. [FF. pars. I and II, Tr. I, pp. 25-26.]

A meeting of the minds presupposes that the consent of the parties is mutual. However, "consent is not mutual, unless the parties all agree upon the same thing in the same sense . . ." (Cal. Civ. Code, Sec. 1580.) Besides being mutual the consent of the parties must be free, and it is not free if obtained through mistake. (Cal. Civ. Code, Sec. 1567(5).)

See: 12 Cal. Jur. 2d, *Contracts,* Secs. 13, 53, 58 and 59.

As was held in *Blake v. Mosher,* 11 Cal. App. 2d 532, 535, 54 P. 2d 492 (1936): "In order that there may be

an agreement, the parties must have a distinct intention common to both, and without doubt or difference."

Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179 (1889);

Mahar v. Compton, 45 N. Y. Supp. 1126, 1128 (1897).

The problem here involved was very well summarized by Professor Corbin in 1 Corbin, Contracts, Sec. 107 (1950) as follows:

> "The great majority of contracts are bargaining contracts, the purpose of which is to effect an exchange of promises or of other performances. To attain this purpose, there must be mutual expressions of assent to the exchange. These expressions must be in agreement; but it is not necessary that they shall consist of identical words or identical acts. Their words and acts are called 'expressions' because they are external symbols of the thoughts and intentions of one party, symbols that convey these thoughts and intentions to the mind of the other party. The symbols so used by one party may be ill-chosen, or the experience and intelligence of the other party may be so variant from that of the first that the understanding of the second is materially different from that of the first. When this is the case, it can not be said that there has been a 'meeting of the minds' or that the parties are in 'agreement,' in the sense in which those terms are usually understood."

The subject matter of the contract found by the district court to exist between the parties is referred to in both of the March 6th letters as ". . . *rayon cartridge cloth in the greige as per government specification PXS-1300* . . . ." [Pltf. Exs. 6 and 7.] The significance of the term "greige" was apparently overlooked by the trial court even though in the textile industry it has a well defined and established meaning. As established by an independent

witness, it refers to cloth in its natural state as it comes off the loom. Greige goods are sometimes referred to as "natural" or "unbleached" goods. In contradistinction, "finished" goods are goods which have in some manner been processed after they have been loomed. [Tr. II, pp. 688-690.] These terms are in every day use and elementary to the textile industry and Mr. Piersol, Mr. Lovett and the other employees of appellant so understood and used them. [Tr. I, pp. 347-348; Tr. II, pp. 549-550, 620-622.]

See, Calloway Textile Dictionary, First Edition, p. 167. [Tr. II, p. 690.]

In this connection, Section 1645 of the California Civil Code provides:

> "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

Where a custom or trade usage of a term is of general and universal application, the parties entering upon a transaction are *conclusively presumed* to know of it and are bound to acquaint themselves with the usages and language of the trade. Once the usage has been proved to be general, certain and uniform (a question of fact), actual knowledge of it by the parties is immaterial. In the case at bar there is absolutely no evidence that "greige" means anything other than as hereinabove set forth or that it is not of general and universal use in the textile industry. Consequently, appellee is bound by its meaning.

Miller v. Germain Seed Etc. Co., 193 Cal. 62, 69, 222 Pac. 817 (1924);

Hind v. Oriental Products Co., 195 Cal. 655, 667, 235 Pac. 438 (1925);

Gelb v. Automobile Ins. Co. of Hartford, 168 F. 2d 774 (2d Cir., 1948);

Western Petroleum Co. v. Tidal Gasoline Co., 284 Fed. 82, 84 (7th Cir., 1922);

Pastorino v. Greene Brothers, 90 Cal. App. 2d 841, 845, 204 P. 2d 368 (1949);

Ermolieff v. R.K.O. Radio Pictures, 19 Cal. 2d 543, 122 P. 2d 3 (1942);

Cf. Fry v. State, 78 N. Y. S. 2d 342 (1948).

Although he had no independent recollection of his first meeting with Mr. Piersol [Tr. I, pp. 162-164], Mr. Mills maintains that he inquired for goods which *when delivered* to him would meet specification PA-PD-29. [Tr. I, p. 76.] The written record of this first meeting, however, shows unquestionably that Mr. Mills asked for quotations on specification PA-PD-29 in *natural* or *unbleached* cloth. [Tr. II, p. 448; Pltf. Ex. 18.] When Mr. Lovett first received Mr. Mills' initial inquiry in New York, he checked with his company's fabric development department where he learned (1) that one of the mills represented by appellant could manufacture greige goods which would meet the specifications when finished, and (2) that the specifications by their very terms called for *finished* goods, free of weighting materials. [Tr. II, pp. 624-626; Pltf. Ex. 5.] As a result, appellant's reply to Mr. Mills' inquiry quoted on "greige" goods, *as did every other quotation ever transmitted to Mr. Mills by Deering-Milliken.* [Pltf. Exs. 1, 2, 18 and 19.]

Appellant deals only in rayon "greige" goods and this is well known to those in the textile industry. [Tr. II, pp. 623-624, 690-691.] Dealing only in such greige goods, appellant interpreted Mr. Mills inquiry for a price quotation as one relating to greige goods which *when finished* by Modern-Aire would meet the specifications of PA-PD-29. [Tr. II, pp. 447, 625-627, 635-639, 672-682.] That this is so is shown by the fact that appellant knew that greige goods would not meet specification PA-PD-29 without finishing and knew that those specifications

called for *finished* goods. Moreover, there was nothing unusual about Mr. Mills' inquiry for greige goods per specification PA-PD-29 since appellant was a griege goods house and since cloth in the greige state had to meet certain standards or else it would not meet specification PA-PD-29 even when finished. [Tr. II, pp. 626-627, 638, 677-679.]

Appellant further believed that Mr. Mills also understood that its quotations for "greige goods" as per PA-PD-29 related to cloth which *when finished* by Modern-Aire would conform to specifications PA-PD-29, [Tr. II, pp. 543-544, 637-639, 678-682] since all through the negotiations Mr. Mills and Mr. Piersol discussed only greige goods. [Tr. II, pp. 431, 434-436, 449, 545.] Appellant's interpretation of Mr. Mills' desires was perfectly consistent with the circumstances then prevailing since Mr. Mills was making inquiry in the name of Modern-Aire, a corporation which for several years had been identified with and done business in the textile industry. [Tr. I, p. 117.] Furthermore, by his own statements and by the very quantity of the cloth for which he made inquiry, Mr. Mills held himself out as being experienced and established in the textile industry.

On the other hand, Mr. Mills claims that his inquiry was for finished rayon cloth which did meet PA-PD-29. His misunderstanding of this situation was undoubtedly due either to his lack of knowledge of the elementary terms used in the industry in which he sought to engage or in particular to the meaning of the word "greige." Mr. Mills testified that *at the time of the negotiations here in question* he believed "greige" referred to the *color* of cloth rather than to all of its natural characteristics as it came off the loom or before it was finished or processed. [Tr. I, pp. 78-79, 165-178, 183-187.] He also admitted that price was his main concern and that *the fact that some of the replies received by him to his inquiries from other sources*

quoted on finished goods and others on greige goods meant nothing to him. [Tr. I, pp. 182-187; Tr. II, p. 572.] Furthermore, it subsequently appeared that Mr. Mills was also unfamiliar with specifications PA-PD-29. [Tr. I, pp. 141-143, 155.]

This basic misunderstanding of the parties did not become apparent until March, 1952, although appellant in all of its negotiations with Mr. Mills always quoted goods "in the greige." [Tr. II, pp. 572-573.] Even though he did not fully understand the terms used in the textile industry or the purport of PA-PD-29, Mr. Mills by his own testimony made no attempt to seek advice with respect to their meaning. [Tr. I, p. 142.]

Normally the mental assent of the parties is not requisite for the formation of a contract; however this is not always the case. One of the well established exceptions to the objective theory of contracts is recognized in Section 71(a) of the Restatement of Contracts and Comment "a" thereof, which read as follows:

> "If the manifestations of intention of either party are uncertain or ambiguous, and he has no reason to know that they may bear a different meaning to the other party from that which he himself attaches to them, his manifestations are operative in the formation of a contract only in the event that the other party attaches to them the same meaning.
>
> *"Comment:*
>
> "a. . . . If the manifestations of the parties have more than one reasonable meaning, it must be determined which of the possible meanings is to be taken. . . . if a party has no reason to suppose that there is ambiguity, he may assert that his words or other acts bear the meaning that he intended, that being one of their legitimate meanings, and he will not be bound by a different meaning attached to them by the other party."

That this principle is part of the law of California is clear from Section 1649 of the *California Civil Code* which provides:

> "If the terms of a promise are *in any respect* ambiguous or uncertain, it *must* be interpreted in the sense in which the *promisor* believed, at the time of making it, that the promisee understood it." (Emphasis added.)

Peerless Glass Co. v. Pacific Etc. Co., 121 Cal. 641, 647, 54 Pac. 101 (1898);

People v. Nolan, 33 Cal. App. 493, 165 Pac. 715 (1917);

See: Myers v. Tibbals, 72 Cal. 278, 13 Pac. 695 (1887).

Appellant submits that the phrase "rayon cartridge cloth in the greige as per government specification PXS-1300" which is contained in the contract found by the district court is ambiguous since the military specification calls for finished goods, and greige goods and finished goods are by definition entirely different things. This phrase therefore must be interpreted in the sense which appellant innocently and reasonably believed that Mr. Mills understood it. Accordingly, it follows that the trial court's finding that appellant and appellee entered into a contract concerning cloth which would meet specification PA-PD-29 is not supported by the evidence.

B. The Findings of Fact Concerning the Written Contract of March 6, 1952, Are Fatally Inconsistent, Conflicting and Uncertain.

Because appellant and appellee in fact did not actually reach an agreement *on March 6, 1952,* upon the specific terms and items about which they had been negotiating, appellee has been forced to adopt an untenable position in its attempt to establish a contract on that date. As a result, paragraphs I, II, III and IV of the district court's findings of fact [Tr. I, pp. 25-26] are inconsistent, con-

flicting and uncertain. These inconsistencies and uncertainties are not immaterial but rather strike at the very heart of appellee's case.

When, as here, the findings of fact are contradictory and uncertain, the judgment rendered thereon cannot stand.

Young v. Enfield, 217 Cal. 662, 20 P. 2d 701 (1933);

Flennaugh v. Heinrich, 89 Cal. App. 2d 214, 200 P. 2d 580 (1948);

Selig Cahn, Inc. v. Alschuler, 56 Cal. App. 2d 875, 133 P. 2d 671 (1943);

Fanta v. Maddex, 80 Cal. App. 513, 252 Pac. 630 (1926).

1. The Terms of the Contract Found by the Trial Court Are Not Complete and Certain.

Before an agreement may be found to be finally settled, it must appear that it comprises all of the the terms which the parties intend to introduce. Further, it must appear that all of the terms are expressed with completeness and certainty. If essential terms are not definite and certain, there can be no binding contract. This rule is set forth as follows in 12 Cal. Jur. (2d) *Contracts,* Section 107, at page 308:

> "Whether an express contract is oral or written, there must be certainty and definiteness of language or words used in expressing the terms and in showing a meeting of the minds of the parties as to the terms. No action will lie to enforce the promise of a contract, or to recover damages for its breach, unless the contract be complete and certain; and the rule applies as well to price as to subject matter and parties."

Hardy v. Hardy, 23 Cal. 2d 244, 143 P. 2d 701 (1943);

Nevills v. Moore Mining Co., 135 Cal. 561, 67 Pac. 1054 (1902);

Talmadge v. Arrowhead R. Co., 101 Cal. 367, 35 Pac. 1000 (1894);

Breckinridge v. Crocker, 78 Cal. 529, 21 Pac. 179 (1889);

Federated Income Properties v. Hart, 84 Cal. App. 2d 663, 191 P. 2d 59 (1948);

Wineburgh v. Gay, 27 Cal. App. 603, 150 Pac. 1003 (1915).

Appellant realizes that these cases generally apply to ambiguities and uncertainties which appear on the face of the contract; however in view of the trial court's conflicting findings as to the terms of the contract found to exist in the present action, appellant submits that these cases are here controlling.

By virtue of paragraphs I [see par. XII of Compl.] and II of the findings of fact, the trial court found that appellant agreed to manufacture and deliver 126,000 yards of cloth at a price of 36⅛ cents per yard for a total purchase price of $45,517.50. Yet by virtue of paragraph III [see Pltf. Exs. 6 and 7] of the findings of fact, the trial court found that appellant agreed to manufacture and deliver 23,900 yards of 47½" cloth at a price of 37⅜ cents per yard and 101,200 yards of 45½" cloth at a price of 36⅛ cents per yard or a total of 125,100 yards of cloth for a total purchase price of $45,491.13.

While the total dollar figure difference is not great, the complete inconsistency of the findings of fact is immediately apparent from the difference in unit price, quantity of cloth, width of cloth and total purchase price found to comprise the contract between the parties. These are not insignificant details which can be ignored. On the contrary, they show that the supposed contract of March 6th was in reality not complete and certain. If a contract existed, it either related to 126,000 yards of cloth of a single width at a cost of $45,517.50 or related to 125,100 yards of cloth of varying width at a cost of $45,491.13.

From the findings of fact, however, it is impossible to ascertain what the terms of the agreement were.

> *Malley v. Sierra Manufacturing Co.,* 118 Cal. App. 2d 643, 258 P. 2d 522 (1953).

More important is the fact that these inconsistencies expose appellee's utter frustration at attempting to discover a theory upon which the existence of a contract might be sustained when in fact the minds of the parties never met. Appellee attained this untenable position since, as Mr. Mills admitted, the exact desires of Modern-Aire with respect to widths, quantity, delivery, shipping and credit were not determined until March 14, 1952. [Tr. I, pp. 260-262.] It was on this date that the parties came as close to a definite agreement as they ever did, for it was on this date that Mr. Mills signed his government contract and first authorized Mr. Piersol to send in his *firm and specific order.* [Tr. I, p. 259.] This order is in evidence as Plaintiff's Exhibit 8. Appellee, however, could not rely on this document as constituting a contract between the parties since it was merely an "order" and provided on its face that it was "subject to acceptance or rejection by our mill." Nor could appellee contend that the March 6th letters constituted an offer and that the March 14th order was an acceptance of the offer because of the complete difference in the terms contained in each document. Rather, as indicated in its pleadings and acknowledged at trial [Tr. I, p. 212], appellee took the position that a definite and certain contract was made on March 6 and that his firm order of March 14 merely "confirmed" that agreement. Although the March 14th order differed in almost every detail from the March 6th letters, the district court apparently adopted this unique theory of appellee. [See FF. par. IV, Tr. I, p. 26.] In so doing, the district court ignored the undisputed evidence that firm orders had to be submitted to New York and the particular textile mill involved for acceptance or rejection.

2. An Agreement to Enter Into Negotiations and to Agree Upon the Terms of a Contract in the Future Does Not Amount to an Enforceable Contract.

In an attempt to make the terms of the March 6th letters definite and certain and thereby explain the inconsistencies in paragraphs I, II and III of the findings of fact, the trial court found that the March 14th "Memorandum of Order" [Pltf. Ex. 8] was prepared by appellant ". . . for the purpose of confirming the fact that a contract had been entered into on or about March 6, 1952 . . . and for the further purpose of confirming certain terms and conditions contained in . . ." that contract. [FF. par. IV, Tr. I, p. 26.] As above stated, this was in accord with appellee's anounced theory of its case. [Tr. I, p. 212.]

That the March 14th order was prepared by appellant to confirm the fact that a contract had been made on March 6th is clearly unsupported by any evidence since it is conceded that it was prepared at Mr. Mills' request and pursuant to his first authorization to send in a firm order. [Tr. I, pp. 259-262; Tr. II, pp. 406, 519-521, 525.] That this order was prepared to confirm certain terms and conditions contained in the March 6th letters is plainly conflicting with the finding that the March 6th letters constituted an agreement between the parties. [FF. par. III.] By definition, "confirm" means "to render valid by formal assent; ratify . . . to give new assurance of the truth of; verify; corroborate." *Webster's Collegiate Dictionary,* Fifth Edition, p. 212.

In light of the complete difference as to quantity, price, delivery, shipping and other terms contained in the March 6th letters and the March 14th order, it is at once apparent that paragraphs III and IV of the findings of fact are fatally inconsistent. A summary of the terms contained in these documents is here presented:

	Letters of March 6, 1952	Order of March 14, 1952
Quantity	125,100 yards	126,000 yards
Widths	45½" and 47½"	Only 45½"
Price per yard	36⅛¢ and 37⅜¢	36⅛¢
Credit	Net 30 days	Net 30 days—10% deposit with contract
Delivery	Start April 25th—	Start April 18—
Shipping instructions	None	Arrow Line sailing from Charleston, S.C.
Packaging instructions	None	Goods shipped in bales
Seconds	None	Not more than 5% seconds
Purchase price	$45,491.13	$45,517.50

If "confirm" means that the March 14th order was an acceptance of an offer of appellant contained in the March 6th letters, as the trial court at one time suggested [Tr. I, pp. 211-213], then it is plain that the findings of fact do not support the judgment rendered herein. Under this interpretation there would simply be no contract since the acceptance was not in the same terms as the offer.

Mahar v. Compton, 45 N. Y. Supp. 1126 (1897);

Marx & Rawolle v. Standard Soap Co., 42 Cal. App. 32, 183 Pac. 225 (1919).

If "confirm" means that the terms and conditions of the contract were made certain for the first time on March 14, 1952, then it must follow that on March 6th the most that the parties did was to agree to agree. This is not only what appellee is driven to contend under its theory of the case, but also what the uncontradicted evidence

shows the facts to be. In the first place, Mr. Mills admittedly continued to negotiate with respect to every item contained in the March 6th letters as well as with respect to new items and terms. Secondly, Mr. Mills did not ultimately decide what he wished to order until March 14. Thirdly, the March 6th letters expressly provide that ". . . the whole thing is predicated on our ability to handle the business when you are in a position to confirm it." Finally, the March 14th order, prepared at Mr. Mills' request, differed completely from the letters of March 6th.

In truth, the parties on March 6 not only left all terms open for future agreement but also contemplated that whatever agreement was to be made would be reduced to writing in a formal contract which is called a "Salesnote" in the textile industry. Mr. Mills expressly testified that this was his understanding. [Tr. I, p. 208.] In addition, Mr. Mills admitted that he read the March 14th order and made no objection thereto except as to a two cent error in price. [Tr. I, pp. 268-270.] In particular he made no objection to the following words contained on this order: "This order is subject to the provisions of our Salesnote." or to the words "Net 30 days—10% deposit with contract."

Thus, not only the evidence presented at trial, but also the findings of fact made by the court below indicate that on March 6, 1952, the specific terms of their negotiations were yet to be agreed upon by appellant and appellee. At the very most, the March 6th letters found by the trial court to constitute a contract were nothing more than an agreement to agree, if indeed they even reached that position of dignity.

This, however, leaves the findings of fact fatally defective since it is well established that where the essential terms of a preliminary agreement are incomplete and unsettled and it is apparent that the ultimate determination

of the details is deferred until a later date, the preliminary negotiations and agreements do not constitute a contract.

Spinney v. Downing, 108 Cal. 666, 668, 41 Pac. 797 (1895);

Avalon Products, Inc. v. Lentini, 98 Cal. App. 2d 177, 180, 219 P. 2d 485 (1950);

Talmadge v. Arrowhead R. Co., 101 Cal. 367, 35 Pac. 1000 (1894);

Sherry v. Proal, 131 App. Div. 775, 116 N. Y. Supp. 234 (1909);

Stone Drill Corp. v. Stoody Company, 4 Cal. App. 2d 367, 40 P. 2d 945 (1935);

Fly v. Cline, 49 Cal. App. 414, 93 Pac. 615 (1920);

Booth v. A. Levy & J. Zentner Co., 21 Cal. App. 427, 131 Pac. 1062 (1913);

Jules Levy & Bro. v. A. Mautz & Co., 16 Cal. App. 666, 117 Pac. 936 (1911).

Since the court found that appellee confirmed the March 6th contract on March 14th by making its terms and conditions specific for the first time, it must follow that the court's finding that a definite contract was made and entered between the parties on March 6th is erroneous since it is contrary to the evidence and fatally conflicting with the other findings of fact made by the trial court.

This principle was applied in *Dillingham v. Dahlgren,* 52 Cal. App. 322, 198 Pac. 832 (1921), an action to recover damages for the breach of an alleged contract for the sale of realty, where the court stated at page 330 of its opinion as follows:

> "An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. Where a final contract fails to express some

matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon . . ."

For yet another reason, the court's finding that the March 14th order "confirmed" the March 6th contract shows the inconsistencies and uncertainties present in the findings of fact made by the court below. It is equally well established that when it is part of the understanding between the parties that the terms of their contract are to be reduced to writing and it is clear that the parties do not intend that a legal obligation shall arise between them until the writing is made, no enforceable agreement arises until the formal contract is executed. In the present case, the very letters found to constitute a contract between appellant and appellee indicate on their face that the parties understood that the terms of their "agreement" were yet to be determined and Mr. Mills acknowledges that on March 6th he understood that the ultimate contract to be made would have to be reduced to writing. [Tr. I, p. 208.] In this connection, paragraph IV of the findings of fact conclusively establishes that the parties have never entered into a contract for this finding states that the March 14th order confirms the terms and conditions of the March 6th contract. If it confirms that contract in part, it must do so in its entirety and the words appearing on that order ("This order is subject to the provisions of our Salesnote." and the words "Net 30 days—10% deposit with contract") cannot be ignored. It has been held many times that such words appearing on a memorandum shows that the memorandum was not intended to constitute a valid and binding agreement between the parties.

Thus, in *Dillingham v. Dahlgren,* 52 Cal. App. 322, 198 Pac. 832 (1921), the court held that the following memo-

randum was not sufficient to evidence an agreement between the parties:

> " 'A. L. Dahlgren agrees to sell to Evelyn L. Dillingham the following described property.
>
> " 'Lots 7 and E ½ 8 Blk. 33 Belmont Add. for the sum of $3750.00 to be paid as follows: $100.00 deposit—*$400.00 on completion of contract* and $35.00 per month or more including interest at 7%.
>
> " 'Seller agrees that he will paint woodwork in kitchen, varnish woodwork in dining and living rooms, also paint porch and steps. Seller agrees to pay for cement walk from house to street, buyer to pay for street work.' " (P. 323.)

The court, in approving a statement contained in 13 Corpus Juris 289, Section 100, stated at page 329 of its opinion, as follows:

> " 'The preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into. To be final, the agreement must extend to all the terms which the parties intend to introduce, and material terms cannot be left for future settlement; nor is there a binding contract where, although its terms have been agreed on orally, the parties have also agreed that it shall not be binding until evidenced by writing.' *The same rule applies whether the preliminary negotiations were oral or in writing, if it manifestly appears that certain parts of the contract are later to be agreed upon and inserted in the formal draft.*" (Emphasis added.)

In the *Dillingham* case the significant words were "$400.00 on completion of contract." In the case at bar the March 14th order contains the words "10% deposit

with contract" and the words "This order is subject to the provisions of our Salesnote," words which are far more certain than those found to be significant in the *Dillingham* case.

Accord:

Co-operative Assn. v. Phillips, 56 Cal. 539, 547 (1880);

Burgess v. Rodom, 121 Cal. App. 2d 71, 262 P. 2d 335 (1953);

Moore v. White, 98 Cal. App. 2d 510, 220 P. 2d 918 (1950);

Restatement of Contracts, Section 26 (Appendix No. 4).

In summary, appellant contends that the findings of fact themselves show that the contract found to exist on March 6, 1952, was in fact incomplete and uncertain on that date. In this connection, the trial court found that the ultimate agreement was for 126,000 yards of 45½" wide cloth. But the court also found that the documents which evidenced the parties' agreement concerned 23,900 yards of 45½" cloth and 101,200 yards of 45½" cloth. The attempt to make these findings consistent and therefore the contract of March 6th certain and complete by finding that the order of March 14th "confirmed" the terms and conditions of the March 6th contract, also must fail. If there had been a definite and certain agreement on March 6th there would have been no necessity for a confirmation of its terms at a later date, yet if the terms and conditions of the contract were not certain on March 6th and were left open for later confirmation, then it seems apparent that the parties reached no agreement on March 6th. It must follow that the findings of fact on their face are inconsistent and conflicting and show that in fact the contract found by the court to exist was incomplete and uncertain and therefore no contract.

II.

The Judgment, Conclusions of Law and Findings of Fact With Respect to Appellee's Damage Are Insufficient, Conflicting and Not Supported by the Evidence.

Appellant sincerely believes and wholeheartedly contends that there was not a definite contract between Deering-Milliken and Modern-Aire for the sale of cloth, greige or otherwise, either on March 6, 1952, or on any other date. If such contention is true, there is, of course, no issue as to the measure or amount of damage. But for the purpose of argument only, appellant here assumes that the evidence is sufficient to support the findings that the parties entered into an agreement on March 6, 1952, and that the inconsistencies in those findings hereinabove noted can otherwise be satisfactorily explained. Even under such assumption, however, appellant submits that appellee is not entitled to recover the type of damage for which it here contends, *i.e.,* (a) future or expected profits and (b) monies allegedly due from it to the United States as damages for appellee's breach of its contract with the United States.

Ever since the celebrated case of *Hadley v. Baxendale,* 9 Exch. 341 (1854), the almost universal measure of general damages in a contract action has been "foreseeability." As stated in that case, recoverable damages are:

> ". . . such as may fairly and reasonably be considered either arising naturally, *i.e.,* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it."

It may fairly be said that this measure of damages has been codified in California by virtue of Section 3300 of the California Civil Code which provides:

> "For breach of an obligation arising from contract, the measure of damages, *except where otherwise expressly provided by this code,* is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Emphasis added.)

As a result of the wording of this code section, the terms "proximate cause" and "ordinary course of things" are used synonymously with "foreseeability" in order to give the concept more meaning.

There is, however, another California code section which specifically applies to the case at bar, *i.e.,* Section 1787 of the California Civil Code. This provision states as follows:

> "(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.
>
> "(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.
>
> "(3) *Where there is an available market for the goods in question,* the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver." (Emphasis added.)

Again, it may generally be said that, except as provided in subsection (3), the test of damages is substantially the same as that found in Civil Code Section 3300.

Of course, under all of these authorities special circumstances may exist which justify the recovery of certain items as damages which without the special circumstances would not be recoverable. But as these authorities are interpreted, it is likewise clear that the damages allowed by the district court in the case at bar are against the law.

A. The Trial Court Has Failed to Find That There Was No Available Market for the Goods in Question.

As provided therein, Civil Code Section 3300 does not apply where another measure of damages is provided by statute, and therefore does not control the case at bar since Civil Code Section 1787 specifically defines the measure of damages for breach of a contract for sale of goods. Where there is an available market for the goods in question, the measure of damages is the difference between the contract price and market price of the goods at the time of breach. [C. C. §1787(3).]

It is only in the absence of the availability of a reasonable substitute that any other measure of damage applies in the situation here presented. Consequently, it was incumbent upon the trial court to find that rayon cartridge cloth of the type contracted for was *not* available to appellee at the time appellant allegedly breached its contract with appellee before the trial court could award as damages either expected profit or money claimed by the United States from appellee.

A case almost directly in point is *Grupe v. Glick,* 26 Cal. 2d 680, 160 P. 2d 832 (1945), which was an action to recover damages for breach of warranty. There the defendant contracted to sell oil refining machines to plaintiff. Three machines were delivered and resold by plaintiff before he discovered that they were worthless. At the time of this discovery, plaintiff was "negotiating for and had offers" to sell five additional machines. The court allowed as part of the damage to plaintiff the loss of profits in connection with the three machines already delivered and

resold by plaintiff even though it had not been shown that a reasonable substitute machine was not available on the open market. In doing so, the court recognized that this was an exception to the general rule that the proper measure of damages to be applied is the difference between the contract price and the market price at the time of breach. The justification given for this exception was that *the goods had already been delivered* without knowledge of the breach of warranty. The court was also willing to allow loss of profits as an item of damage for the five machines which had not been delivered if it was shown that there were no reasonable substitute machines available on the open market. However, this was not shown and the court therefore reversed the judgment allowing such profits since *as a matter of law* it could not be said that expected profit was within the contemplation of the parties. In this connection the opinion stated at page 694:

> "The award of such profits, however, depends upon the existence of an additional factor upon which the trial court made no findings, namely, the absence of a reasonable substitute in the market. It is clear that if a machine of like quality as that warranted was reasonably available to Grupe, he could have completed the sales for which he was negotiating; in other words the loss of profits from those sales could not be said to have been within the contemplation of the parties under such circumstances. Accordingly, the trial court was required to make a finding as to the availability of a reasonable substitute at the time in question."

Appellant cites the *Grupe* case as being almost directly in point only because the action was for breach of warranty and not breach of contract in the usual sense. The court therefore was interpreting Civil Code Section 1789(7) rather than Civil Code Section 1787(3). Civil Code Section 1789(7) does not contain the express limi-

tation that there be or not be "an available market for the goods in question" in determining whether expected profits may be recovered as does Civil Code Section 1787(3), but the court nevertheless implied such limitation. It must follow *a fortiori* that the rule of the *Grupe* case as to the necessity of an express finding that there was no reasonable substitute available on the open market should be applied to the case at bar. That this is so was recognized by the within court in *Bercut v. Park, Benziger & Co.,* 150 F. 2d 731 (9th Cir., 1945).

Las Palmas Distillery v. Garrett & Co., 167 Cal. 397, 401, 139 Pac. 1077 (1914);

Coates v. Lake View Oil & Refining Co., 20 Cal. App. 2d 113, 66 P. 2d 463 (1937);

Monaci v. Turner, 37 Cal. App. 2d 98, 98 P. 2d 755 (1940);

El Rio Oils v. Pacific Coast Asphalt Co., 95 Cal. App. 2d 186, 213 P. 2d 1 (1949).

The District Court's failure to make this essential finding of fact is easily explained, for it is uncontradicted that there was in fact an open market for rayon cartridge cloth which would meet specification PA-PD-29 at the time appellant allegedly breached the contract here in issue. This was proved not only by appellant's evidence but also by that of appellee's. [Deft. Ex. Z; Pltf. Exs. 15 and 16.] These exhibits represent quotations on the necessary cloth made to Mr. Mills as a result of his inquiry and therefore also show that he had actual knowledge of the availability of rayon cartridge cloth. One of these replies to Mr. Mills quoted a price for the total yardage required by Modern-Aire which exceeded the price quoted by appellant by only $722.50. [Deft. Ex. Z.] Since evidence was presented on this issue, it was incumbent for the trial court to expressly find that the cloth was unobtainable on the market before it could award as damages any item other than the difference in the price for which appellant agreed to sell

the goods and the then market price of similar goods. The absence of such finding constitutes reversible error.*

B. The Findings in Regard to Loss of Profits Are Insufficient, Conflicting and Not Supported by the Evidence.

Appellant concedes that there is no longer any doubt that loss of profits may be recovered for breach of contract in proper cases. However, where the profits stem from contracts other than that sued upon or from third, "collateral" sources, such profits are not recoverable unless they (1) are within the contemplation of the parties at the time the contract sued upon is made and (2) can be proved with reasonable certainty.

As to loss of profits, the District Court found by reference to the complaint filed in the trial court that on March 14, 1952, the appellee and the United States entered into a contract whereby appellee agreed to manufacture 459,200 inner assembly liners and the United States agreed to pay $0.151 for each liner or a total of $69,339.20 [FF. par. I *re:* Complt. par. IV, Tr. I, pp. 4-5]; that by the terms of the contract with the United States the quantity of liners could vary two per cent (2%) more or less "provided such variation was caused by conditions of loading, shipping, or packing or allowances in manufacturing process." [FF. par. I *re:* Complt. par. V, Tr. I, p. 5]; that by reason of said permitted variation in quantity appellee was authorized to manufacture a maximum of 468,384 liners [FF. par. I *re:* Complt. par. VI, Tr. I, p. 5]; that upon manufacture and delivery of 468,384, the United States would pay a total purchase price of $70,725.98 [FF. par. I *re:* Complt. par. VII, Tr. I, p. 6]; and that appellant knew or should have known that the terms of appellee's government contract would allow appellee a certain profit and that such

*Appellee acknowledged the proper measure of damages to be the difference in the contract price and market price at the time of breach in its letter of demand mailed to appellant prior to the commencement of the within action. [Deft. Ex. Y.]

anticipated profit was reasonably within the knowledge and contemplation of the parties from January to March 14, 1952. [FF. par. I *re:* Complt. par. XXI, Tr. I, p. 13.] The District Court then went on and specifically found that appellee's cost of manufacturing said inner assembly liners "was" $66,304.38 [FF. par. V, Tr. I, pp. 26-27]; that the United States agreed to pay appellee a total price of $70,725.98 [FF. par. VI, Tr. I, p. 27]; and that pursuant to its contract with the United States, appellee would have realized a profit, and accordingly was damaged, in the sum of $4,421.60. [FF. par. VII, Tr. I, p. 27.]

A discriminating review of these findings shows that they are conflicting and insufficient to support the judgment rendered herein.

1. Loss of Profits Claimed by Appellee Are Too Remote, Speculative and Uncertain to Be Recovered.

Conceding that profits are a proper element of damage, it is fundamental that they must be proved with reasonable certainty. Unless there is an established basis on which to prove that profits would be made and their amount, they must be deemed to be remote and speculative and therefore not recoverable. In this regard, California Civil Code Section 3301 provides:

> "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

Mr. Mills is the president and sole owner of appellee, Modern-Aire, and at the time here pertinent had no experience in manufacturing or fabricating textiles. So far as he is concerned, Modern-Aire is a new and unestablished business operating in that part of the textile industry where Mr. Mills denies all but the most limited experience and knowledge. When Modern-Aire was acquired by Mr. Mills, it was, in his words, "a shell of a

company." It was acquired for the primary purpose of having a medium through which Mr. Mills might seek to obtain government contracts for finished textile items. However, Modern-Aire during all of the time here in question had no employees except a foreman who was hired after March 6, 1952, and in fact never produced a single item until late in 1952 after its negotiations and dispute with appellant when, for a very short time, its facilities were used by Mr. Mills in the manufacture of ladies sportswear. Although contracts for the manufacture of flare parachutes, surgical drapes and 105 mm. and 75 mm. cartridge case liners were all sought from agencies of the United States during the period here in question, the only government contract ever obtained by Modern-Aire was one for 105 mm. cartridge case liners presented in this action as Plaintiff's Exhibit 12. [Tr. I, pp. 73-74, 116-118, 120-122, 124.]

It is well established as a matter of law that where, as here, the company seeking to recover damages is a new venture without any previous experience in the industry, loss of profits cannot be included as a part of the damages recoverable because there is no base upon which to prove what its profits would have been.

One of the leading cases on this subject is *California P. Mfg. Co. v. Stafford P. Co.*, 192 Cal. 479, 221 Pac. 345 (1923). There the plaintiff-buyer purchased from the defendant-seller a machine (called a "plant") for making fish oil which he intended to begin to manufacture. The seller warranted that the machine could produce a certain tonnage when in fact it could not. The buyer sought to recover loss of profits on the amounts which, under the warranty, should have been produced. In disallowing such damages as too uncertain, the court said at pages 484-485 of its opinion:

> "Another element enters into the consideration. At the time the parties were negotiating for the sale and

purchase of the fishmeal plant in this case, the respondent had not theretofore engaged in the conversion of its fish offal or cannery waste into fishmeal. *It therefore had no experience in the operation of any such plant as it contemplated purchasing. So far as it was concerned, the enterprise was a new undertaking and engaging in a new industry.* The reduction of cannery by-products into fishmeal and fish oil by appellant's process was an entirely new industry invented by the president of the appellant corporation. It would appear unlikely, therefore, that either the appellant or the respondent had in contemplation a warranty by the appellant sufficient to cover anticipated profits which the respondent might realize had the machine the capacity called for by the contract. *As a proposition of law,* it is well established that loss of profits growing out of a breach of contract, and resulting to an unestablished business, is of too uncertain a character to constitute a basis for the computation of damages for the breach. . . . Where a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation. . . . The rule is one of necessity. Damages must be certain of ascertainment. *If one engages in a new industry, there are no provable data of past business from which the fact can be legally deduced that anticipated profits would have been realized. . . .*" (Citations omitted and emphasis added.)

Gibson v. Hercules Mfg., etc., Co., 80 Cal. App. 689, 252 Pac. 780 (1927).

Accord:

Lacy Mfg. Co. v. Gold Crown Mining Co., 52 Cal. App. 2d 568, 126 P. 2d 644 (1942);

Greenwood County v. Duke Power Co., 107 F. 2d 484 (4th Cir., 1939);

32 A. L. R. 120;

99 A. L. R. 938.

As stated in these cases, if an established business is interrupted, past profits and experience furnish the basis for calculating the damage. Where an unestablished and new business is interrupted, there is no satisfactory basis on which to say there would or would not have been a profit realized. In such a case, alleged loss of profits are merely remote, contingent and speculative, existing only in anticipation or at most on paper. Losses are equally possible. The very fact that the District Court found that the government had to pay some $4,000 over its contract price with Modern-Aire in order to obtain the inner assembly liners indicates, perhaps, that appellee would not have made any profit. That appellee may have made a bad contract with the United States is emphasized, moreover, by Mr. Mills' own testimony that he had absolutely no previous experience in fabricating textiles. [Tr. I, p. 118.]

There are, of course, many cases allowing loss of profit as an element of damage, but appellant has found none which go so far as the trial court did here. All cases allowing profits find that some satisfactory standard has been shown on which to calculate expected profit with reasonable certainty. In some, the court has permitted profits to be established by reference to a related business similarly situated, but even there detailed evidence as to gross sales and probable expenses were required.

See:

Steelduct Co. v. Henger-Seltzer Co., 26 Cal. 2d 634, 160 P. 2d 804 (1945).

In the *Grupe* case above referred to (26 Cal. 2d 680, 160 P. 2d 832 (1945)), the California Supreme Court

liberalized this doctrine in but a small degree. As above mentioned, the court allowed, except for inadequate findings, loss of profits on five machines for which the buyer had been negotiating and "had offers" for resales. In other words, the court felt that as limited to these five machines, the buyer had established with reasonable certainty the amount of future sales. As to expenses, the court permitted the plaintiff to rely upon his experience in having *already* sold three machines. To this extent there was at least some past experience upon which to estimate loss of profit. The court refused, however, to go further and allow profits on possible future sales. But this case is not controlling in the case now before the court since here it is uncontradicted that appellee has never manufactured any textile articles while owned by Mr. Mills. [Tr. I, pp. 73-74, 116-118, 120-122, 124.]

Appellee may seek to argue that the authorities above cited have no application for the reason that appellee obtained a definite contract with the government and therefore it is reasonably certain that profits would have been made. Such argument would overlook the fact that profit is the difference between sales price and costs. While the sales price to the government may have been established, there is still no satisfactory basis on which to estimate appellee's probable costs with any degree of certainty whatsoever. Without this, profits are still purely speculative.

Just how speculative these costs are is best shown by the evidence presented at trial. [Tr. II, pp. 576-611.] The only direct evidence of appellee's estimated costs was Mr. Mills' testimony that in his opinion his costs would have amounted to $57,000. [Tr. I, pp. 110-111, 306-308.] Mr. Mills admittedly had no experience in fabricating textiles and was not an accountant. [Tr. I, p. 118; Tr. II, p. 576.] On cross-examination it was shown that Mr. Mills' estimate of his expenses was at most a guess. His esti-

mate assumed that there would be absolutely no waste material and that he could utilize in his fabricating process all "seconds." [Tr. II, p. 577.] Relatively small amounts of costs were completely ignored by Mr. Mills in making his estimate. [Tooling $750, Tr. II, p. 588; Rent for "clicker," $28, Tr. II, p. 592.] Only 50% of his estimated fixed overhead was charged as costs on the government contract for the reason that Mr. Mills intended to manufacture other products and thereby spread his fixed cost to these other products. However, it is uncontradicted that no other business was even ever obtained. [Tr. II, pp. 593-598.] Moreover, overhead was based on *only 35 days* of production although Mr. Mills admitted that his government contract would take at least four months. [Tr. II, pp. 598-599.] Mr. Mills' estimate of expenses *to the trial court* included the minimum labor charge of $1.00 per hour which was shown to be below the union scale of $1.25 per hour. It was shown, however, that Mr. Mills had estimated *to the government* that he would pay union scale rates of $1.25 per hour. His labor cost estimate did not include any margin for strikes, breakdowns or other unforeseen events. [Tr. II, pp. 603-604.] Mr. Mills' estimate made no provision for an inspection of the cartridge case liners after they were manufactured, although it was obvious that his product had to meet rigid government specifications. [Tr. II, p. 608.] Mr. Mills' cost figures assumed that it would take an average of .837 minutes to produce each unit [Pltf. Ex. 17]; however, Mr. Mills himself testified that it would have taken approximately three hours to produce 100 units, which is 1.80 minutes per unit. [Tr. I, p. 149.] It might also be noted that the cost of the material as set forth in the contract found by the court to exist between appellant and appellee [Pltf. Exs. 6 and 7] differs in amount from that on which Mr. Mills based his estimate. [Pltf. Ex. 17.]

Even though Mr. Mills actually submitted cost figures to the army before he obtained the government contract here in question [Tr. I, pp. 192-194], he maintained at trial that the only written record which he had bearing upon the subject was an estimation of costs prepared by himself *after* the dispute with appellant arose [Tr. I, pp. 238-240, 304-305; Pltf. Ex. 17] for use by his counsel. [Tr. II, pp. 574-575.] This document of course substantiated Mr. Mills' claim that his estimated expenses would have been $57,000; however, the typewritten figures which had been scratched out in pencil on the reverse side of the document showed an estimated cost of producing 459,200 rayon liners which was from $8,000 to $9,000 greater than that to which Mr. Mills testified. Mr. Mills *denied* that these latter figures related in any manner to his government contract [Tr. II, pp. 590-591], *even though it subsequently appeared that they were identical in every detail with the estimate of costs submitted by him to the government.* [Deft. Ex. CC.]

Mr. Mills' apparent inability to recall that the cost figures which he submitted to the government were some $8,000 to $9,000 greater than those he prepared *after* the dispute with appellant arose in itself shows the highly contingent and speculative nature of future profits. The facts of this case present the very reason for the rule that as a matter of law future profit may not be recovered where the plaintiff is an unestablished business without any past experience on which even an approximate calculation of the amount of expected profit can be made. The evidence in this regard must approach, at least, the area of reasonable certainty.

In the case at bar the only testimony presented was the estimate of Mr. Mills. Since his estimate was not based on any provable data, there is no sufficient evidence to support the lower court's finding in regard to loss of profits. This was specifically held in *Central Coal & Coke Co. v. Hartman,* 111 Fed. 96 (8th Cir., 1901)

where the court stated in regard to very similar testimony, at page 102:

> "Testimony of this character is nothing but conjecture, and it presents no substantial evidence to make certain the profits that were lost, if any. Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts.
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> *Fireside Marshmallow Co. v. Frank Quinlan Const. Co.,* 213 F. 2d 16 (8th Cir., 1954);
>
> *United States v. Griffith, Gornall & Carman, Inc.,* 210 F. 2d 11 (10th Cir., 1954);
>
> *White River Sheep Co. v. Barkley,* 288 Pac. 1029, 1033, 37 Ariz. 60 (1930).
>
> *See also:*
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> *Monaci v. Turner,* 37 Cal. App. 2d 98, 98 P. 2d 755 (1940);
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> *Coates v. Lake View Oil & Refining Co.,* 20 Cal. App. 2d 113, 66 P. 2d 463 (1937);
>
> *Stephany v. Hunt Brothers Co.,* 62 Cal. App. 638, 217 Pac. 797 (1923);
>
> *McCormick, Damages,* Sec. 29, p. 109.

For these reasons appellant respectfully submits that the findings of fact in regard to appellee's estimated cost [FF. par. V, Tr. I, pp. 26-27] and therefore the amount of expected profit [FF. par. VII, Tr. I, p. 27] is insufficient under the law and not supported by sufficient and competent evidence.

2. The Findings of Fact With Respect to Gross Receipts Are Inconsistent and Not Supported by the Evidence.

Assuming that loss of profits is a proper element of damages in the within action, the trial court was required to find the amount of appellee's estimated gross receipts (in this case the price the United States had agreed to pay for the inner assembly liners) and the amount of appellee's estimated expenses, in order to calculate the estimated prospective profits of appellee. In this connection, the District Court specifically found that under its contract with appellee the *"United States promised and agreed"* to pay appellee a total of $70,725.98. [FF. par. VI, Tr. I, p. 27.] *There is absolutely no evidence to support this finding of fact.* The government contract with appellee is in evidence with this case [Pltf. Ex. 12] and specifically provides that appellee was to manufacture 459,200 inner assembly liners, for which the United States agreed to pay a total of $69,339.20.

The trial court's error in this regard no doubt occurred as a result of appellee's over-zealous contentions and expectations as to its expected profits. Appellee alleged in its complaint that under its contract with the United States it had agreed to manufacture 459,200 inner assembly liners and that the United States had agreed to pay a total purchase price of $69,339.20. [Complt. par. IV, Tr. I, pp. 4-5.] Appellant further alleged that the terms of the government contract provided that the quantity of liners could vary 2% more or less *"provided such variation was caused by conditions of loading, shipping or packing or allowances in manufacturing process"* [Complt. par. V, Tr. I, p. 5]; that by reason of such permitted variation appellee was *"authorized"* to manufacture a maximum of 468,384 inner assembly liners [Complt. par. VI, Tr. I, p. 5]; and that upon the manufacture and delivery of the maximum amount of liners, the United States *"would pay"* a total

purchase price of $70,725.98. [Complt. par. VII, Tr. I, p. 6.] In its findings of fact the trial court expressly found that each of these allegations were true. [FF. par. I, Tr. I, p. 25.] It becomes at once apparent that these findings are not supported by the evidence, are insufficient and conflict with the specific finding that the government *"promised and agreed"* to pay $70,725.98.

To begin with, the findings made by the District Court by reference to the allegations of the complaint, state as a fact that the United States "promised and agreed to pay" $69,339.20 but that under certain conditions the United States "would pay" a total of $70,725.98. The specific finding made by the court is that the United States "promised and agreed" to pay $70,725.98. The inconsistency in these findings is obvious. In the second place, appellee's government contract was for a basic quantity of 459,200 inner assembly liners. While the contract provided for a plus or minus variation in quantity of 2% it did so only where such variation was caused by conditions occurring in appellee's manufacturing process. There is no finding of fact that these conditions ever occurred nor any evidence to support such finding. Indeed, such finding could not have been made since appellee never started to manufacture the inner assembly liners. Whether or not there would have been a 2% plus variation or a 2% minus variation is purely speculative. It is just as possible that appellee would have manufactured 2% less than the specific amount contracted for. Appellant therefore submits that even if it be determined that appellant has entered into a contract with appellee, that appellant has breached that contract, and that expected profits may be awarded as an item of damage to appellee, nevertheless the District Court's calculation of appellee's prospective profit was, as shown by the uncontradicted evidence and the findings themselves, excessive in the amount of $1,386.78. Consequently, appellee's loss of profits amounted to, at most, $3,034.82, even if it be conceded that appellee has estab-

lished the amount of its estimated costs with a reasonable degree of certainty.

Flennaugh v. Heinrich, 89 Cal. App. 2d 214, 200 P. 2d 580 (1948).

C. The Findings, Conclusions and Judgment With Respect to the Money Claimed by the United States Are Insufficient, Conflicting and Not Supported by the Evidence.

Appellee also seeks to recover as damages a penalty for which it is allegedly liable to the United States for having breached its contract with the United States. As to this element of damage, the District Court found that appellant knew or should have known that if it breached its agreement with appellee, the United States would terminate its contract with appellee and would charge appellee for any and all damages sustained by the United States by reason of appellee's failure to perform its contract with the United States [FF. par. I *re:* Complt. par. XXIV, Tr. I, p. 14]; that the United States "demanded" that appellee pay to it the sum of $4,100.66, "the amount of bona fide damages sustained by the United States as a result of the breach of the agreement herein sued upon" [FF. par. XVI, Tr. I, p. 30]; that except for appellant's breach of its contract with appellee, the United States would not have made a claim against appellee for the payment of said $4,100.66 [FF. par. XVII, Tr. I, p. 30]; and that appellee "believes" that the United States "will, in due course, proceed against (appellee) in the manner and form provided by law, to enforce payment of said sum of $4,100.66." [FF. par. I *re:* Complt. par. XXVII, Tr. I, p. 15.]

1. The Conclusions of Law and the Judgment With Respect to the Money Claimed by the United States Are Insufficient, Inconsistent and Contingent.

From these findings of fact with respect to the money claimed by the United States, the District Court concluded

that the plaintiff (appellee) was entitled to judgment against the defendant (appellant) for damages in the sum of $8,522.26 (the amount of the claim of the United States plus the amount of appellee's estimated future profits) with interest thereon at the rate of 7%. [Concl. of Law, par. I, Tr. I, p. 32.] Paragraph II of the Conclusions of Law [Tr. I, p. 32] is so unique that it is here set forth in full:

> "That the sum of $4,100.66, being the amount of the claim and demand made by the United States of America against the plaintiff, is a sum which, *if due and owing,* is payable by the defendant, and that said amount is a trust fund or trust monies to be held as such *by the defendant* for the use and benefit of the United States of America." (Emphasis added.)

The judgment rendered by the District Court [Tr. I, p. 34] upon these conclusions of law ordered that plaintiff "do have and recover" from defendant the sum of $8,522.-26, together with interest at the rate of 7%. The judgment then provided in part as follows:

> ". . . that from said amount the sum of $4,100.66 be *held by the plaintiff* as trust monies for the use and benefit of the United States of America and *immediately upon receipt by plaintiff be remitted to the United States.*" (Emphasis added.)

The several inconsistencies between the conclusions themselves and the conclusions and the judgment are plain and render the same wholly invalid and of no effect. In the first place, both the conclusions and the judgment are in the present tense in the sense that damages in the sum of $8,522.26 are awarded *forthwith* to appellee. Yet paragraph II of the Conclusions of Law is wholly speculative and contingent, stating that the sum of $4,100.66 claimed by the United States is payable by appellant only "if due and owing." In the second place, although judgment is given forthwith to appellee for the whole amount, para-

graph II of the conclusions states that the amount claimed by the United States should be held in trust *by appellant* for the use and benefit of the United States. Notwithstanding these conclusions, the judgment states that the sum should be held *by appellee* as trust monies for the use and benefit of the United States. There is a further inconsistency in that while the judgment states that the sum of $4,100.66 is to be held by the plaintiff in trust, it further provides that immediately upon receipt by the plaintiff, said sum be remitted to the United States. As a by-product of these inconsistencies, appellee has been awarded interest at the rate of 7% per annum on the total amount of the judgment, to wit: $8,522.26, even though it appears that it was the intent of the trial court to award $4,100.66 of that judgment directly to the United States.

Apart from these inconsistencies, the conclusions of law are insufficient to support the judgment awarding $4,-100.66 to the United States. The sole conclusion made by the District Court in this regard is "that the sum of $4,-100.66, *if due and owing,* is payable by . . ." appellant. By participial reference only this sum is described as "being the amount of the *claim* and *demand* made by the United States" against appellee. It thus appears that the trial court not only failed to conclude that any sum is presently due and owing to the United States, but also expressly left the matter open. Nor is there a conclusion or finding that the United States has in fact been damaged. The conclusions here made refer to the $4,100.66 merely as a sum which was claimed and demanded by the United States from appellee. Such is not enough to establish liability to the United States either on the part of appellee or appellant let alone support a judgment ordering that appellant forthwith pay to appellee $4,100.66 and that immediately upon receipt by appellee be paid to the United States.

The conflicts here presented are neither insignificant nor immaterial, but rather render the conclusions and judgment made by the trial court totally insufficient and erro-

neous. They also emphasize the difficulty faced by appellee in attempting to establish as an element of damage that which is wholly remote, speculative and contingent and which could not be proved with any degree of certainty.

Young v. Enfield, 217 Cal. 662, 20 P. 2d 701 (1933).

2. Damages for Which Appellee Might Be Liable to the United States Were Not Within the Contemplation of the Parties.

Appellant does not contend that the amount of liability incurred on a collateral contract with a third party can never be recovered as an element of damage. However, appellant does contend that such damage may be allowed only under very exceptional circumstances, since as a general rule, damages to persons not parties to the contract in question cannot be considered as the natural consequences of its breach.

With respect to the money claimed by the United States, the trial court did not specifically find that this item was within the contemplation of appellant and appellee at the time they contracted on March 6, 1952, as it did with respect to future profit. [FF. par. I *re:* Complt. par. XXI, Tr. I, p. 13.] In this connection, the trial court found that except for appellant's breach of its contract with appellee, the United States would not have made a claim against appellee for the payment of $4,100.66. [FF. par. XVII, Tr. I, p. 30.] Although this finding establishes that appellant's conduct *in fact* caused the United States to make a claim upon appellee, it is wholly inadequate to show that the alleged detriment to the United States was *proximately* caused by appellant's action or *in the ordinary course of things* would be likely to result therefrom. Of course, causation in fact is necessary for liability, but causation in fact is alone insufficient to establish liability.

California Civil Code, Sec. 1787.

The only other finding made by the trial court on this issue of the case states that appellant knew or should have known that if it breached its agreement with appellee, the United States would, under and pursuant to the statutes provided therefor, terminate its contract with appellee and would charge appellee for any and all damages sustained by the United States by reason of appellee's failure to perform its contract with the United States. [FF. par. I *re:* Complt. par. XXIV, Tr. I, p. 14.] This finding is also inadequate to establish that appellee's possible liability to the United States was within the contemplation of appellant and appellee at the time they contracted on March 6, 1952, since there is no finding that appellant knew the goods contracted for could not be obtained elsewhere. Where the alleged detriment stems from "collateral" sources, not directly connected with the particular contract sued upon, this is absolutely necessary.

Marcus & Co. v. K. L. G. Baking Co., 3 A. 2d 627, 122 N. J. L. 202 (1939);

Agabiti Bros. v. Cantana, 86 A. 2d 592, 18 N. J. Super. 45 (1952);

Czarnikow-Rionda Co. v. Federal Sugar Refining Co., 255 N. Y. 33, 173 N. E. 913 (1930);

See also:

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 47 L. Ed. 1171 (1903);

McGuire v. Osage Oil Corporation, 55 S. W. 2d 535 (Texas, 1932);

Snell v. Cottingham, 72 Ill. 161 (1874).

If it be determined that these findings are sufficient to show that the claim made by the United States was within the contemplation of the parties at the time they contracted, appellant answers that the evidence does not support such finding. Absolutely no evidence was presented that appellant had any knowledge either of the terms of the agreement or of the statutes, if any, under and pursuant to

which the United States would terminate said contract. Moreover, the uncontradicted evidence indicates that there was an available market for rayon cartridge cloth of the type which formed the subject matter of the contract between appellant and appellee. [Pltf. Exs. 15 and 16; Deft. Ex. Z.] Since a reasonable substitute was available it follows that it was not foreseeable that appellee would breach its contract with the United States even if appellant failed to deliver the goods as agreed.

At most the evidence shows that at the time appellant and appellee supposedly contracted, appellant knew that appellee intended to attempt to consummate a contract with the United States. Mere knowledge of such a resale contract, however, is insufficient as a matter of law to establish that the terms of that contract were within the contemplation of the parties at the time they contracted.

J. M. Hays Wood Products Co. v. Simmons Saddlery Co., 213 Mo. App. 434, 255 S. W. 973 (1923);

Macchia v. Megow, 355 Pa. 565, 50 A. 2d 314 (1947);

Arkwright Mills v. Clearwater Mfg. Co., 61 S. E. 2d 165 (S. C., 1950).

As it turned out, appellee did contract with the United States; however, this did not happen until eight days after appellant and appellee had supposedly entered into their alleged agreement. Futhermore, the terms of the government contract were never brought to appellant's knowledge even after it had been executed. More important, it was not shown that at the time they are alleged to have contracted appellant had any knowledge of special circumstances which might have indicated to appellant that appellee would be unable to perform its contract with the United States, as, for example, that appellee was not a going concern fully equipped to produce cartridge case liners or that Mr. Mills had but little experience in the

textile industry and might therefore be unable to make adequate substitute arrangements for the required rayon cloth. On the contrary, the evidence which was produced indicated that appellant thought it was doing business with a well established concern. During all of his negotiations with appellant, Mr. Mills made inquiry in the name of Modern-Aire, a corporation which for many years had been identified with and done business in the textile industry. [Tr. I, p. 117.] Also by the very quantity of cloth for which he made inquiry, Mr. Mills held himself out as being established and experienced in textiles.

In summary, appellant contends that the findings of fact are insufficient to show that at the time they contracted, the parties contemplated that if appellant failed to supply rayon cloth to appellee, appellee would be forced to breach its contract with the United States and appellant would indemnify appellee for any damages suffered to the United States. But even if the findings of fact are adequate to establish this, appellant submits that such findings are not supported by the evidence presented at trial.

3. The Fact of Appellee's Liability to the United States Has Not Been Established.

The United States is not a party to this action and therefore any determination herein is in no sense binding upon it. But apart from this, it has not been established either by the evidence, findings of fact or the conclusions of law that appellee is even liable to the United States. In its complaint appellee was very careful never to allege that it actually breached its agreement with the United States or that it was in any manner or degree presently liable to the United States. Nor do the findings of fact state that appellee breached its contract with the United States. The closest the findings of fact come in this regard is that it is found that the United States "demanded" that appellee pay to it a certain sum and that except for *appellant's* breach the United States would not have made

"claim" against appellee. [FF. pars. XVI and XVII, Tr. I, p. 30.] Appellee's extreme caution in this regard is exemplified most apparently in paragraph II of the conclusions of law [Tr. I, p. 32] where it is concluded that the sum of $4,100.66 is an amount which "*if* due and owing" is payable by appellant.

A final indication of appellee's unwillingness to admit that it is in fact liable to the United States is found in paragraph XXVII of its complaint. [Tr. I, p. 15.] There appellee alleged that it "believes" that the United States "will, in due course, proceed against (it) in the manner and form provided by law, to enforce payment of said sum of $4,100.66." There is, however, no allegation that appellee believes the position taken by the United States is valid or that it has no defense against a possible law suit by the government. Although there is absolutely no evidence in the record as to what the United States has done or intends to do in the future to enforce its "claim," the trial court found these allegations to be true. [FF. par. I, Tr. I, p. 25.]

Before appellee may recover for amounts which it allegedly owes to third persons at least *the fact* of liability must be established and this liability must be absolute.

> *Maryland Coal & Coke Co. v. Quemahoning Coal Co.,* 176 Fed. 303, 308 (4th Cir., 1909).

There are but a few cases throughout the United States which have even gone so far as to allow a plaintiff in a normal contract action to recover as an item of damage for breach of the contract amounts which the plaintiff was required to pay to third persons. In each of these cases, however, at least the *fact* of liability was established.

> *House Grain Co. v. Finerman & Sons,* 116 Cal. App. 2d 485, 253 P. 2d 1034 (1953);
>
> *O'Connell v. Main Etc. Hotel Co.,* 90 Cal. 515, 27 Pac. 373 (1891).

As pointed out in the Restatement of Contracts, Section 334, there are many instances where the costs of litigation or the amount of settlement paid by a buyer to his sub-purchaser may be recovered against the original seller. These cases, however, must be distinguished from the precise facts presented by this appeal, for each of those cases dealt with a type of promise which could be said to "run" to the sub-purchaser, *e.g.,* a warranty of fitness, a covenant of quiet possession or a guarantee of endorsements. All of these promises are in the nature of an indemnity—at least to the extent that the original seller had reason to believe that his buyer would sell or transfer the goods and make the same promise to his sub-purchaser.

More significant, in the breach of warranty type case the liability of the buyer is clearly established from the mere fact that the buyer made a contract with his sub-purchaser and that the original seller breached the contract with his buyer. This is so because the very same promise is contained in both contracts. If the original seller breached his contract, it necessarily follows that the buyer breached his. But that is not the situation now before the court since appellant's promises to appellee are completely different from appellee's promises to the United States. Thus, even if it be determined that appellant breached its contract with appellee, it does not follow that appellee is liable to the United States.

Under the pleadings and findings of fact, as above indicated, appellee has not admitted liability to the United States. In this connection, appellant feels constrained to point out that appellee might not in fact be liable to the United States since General Provision 11(b) of the government contract [Pltf. Ex. 12] appears to provide a complete defense under appellee's theory of its case. What other defenses appellee may have are unknown.

Equally important is the fact that there is no finding or conclusion that the United States has been actually

damaged. In this connection, paragraph XVI of the findings [Tr. I, p. 30] provides that the United States demanded that appellee pay to it the sum of $4,100.66, "the amount of bona fide damages sustained by the United States as a result of the breach of the agreement herein sued upon." Paragraph II of the conclusions [Tr. I, p. 32] refers to said sum as "being the amount of the claim and demand made by the United States against the plaintiff." Both of these references are completely inadequate to establish that the United States has been in fact damaged since they are merely statements by way of descriptive recital or by participial reference.

Vilardo v. County of Sacramento, 54 Cal. App. 2d 413, 129 P. 2d 165 (1942).

Appellant is not urging a technicality in this regard but believes that in the complete absence of any admission by or finding that appellee was in fact liable under its contract with the United States or that the United States was in fact damaged, it is unfair to appellant to hold it responsible for this alleged detriment since it is only by relation through the appellee that appellant may be held answerable at all.

Whether or not the government will take any steps to enforce its claim against appellee is problematical. In truth, the United States knew of the within action from its very inception but for more than two years has taken no action either directly against appellee or as an intervenor in the within suit. Before appellee may be compensated in this regard, it must be shown that it has suffered some actual loss, or that as a reasonable probability such loss will occur.

4. The Amount of Appellee's Alleged Liability to the United States Has Not Been Established With any Reasonable Certainty.

Even if it be assumed that appellee is in fact liable to the United States, still the evidence, findings and conclusions are insufficient to support that portion of the

judgment ordering a trust fund be created for the benefit of the United States. The findings of fact [FF. par. XVI, Tr. I, p. 30] and the only evidence in point [Pltf. Ex. 13] show only that the United States has "demanded" $4,100.66 from appellee. A mere demand however is wholly incompetent to establish the actual amount of damage to the government.

As stated in 14 Cal. Jur. 2d *Damages,* Section 18, page 647:

> "The mere fact that a third party has demanded payment by the plaintiff of a particular liability is not in itself sufficient to support an award of damages therefor, for that party may never attempt to force the plaintiff to satisfy his alleged obligation."

The case of *Pacific Pine Lbr. Co. v. W. U. Tel. Co.,* 123 Cal. 428, 56 Pac. 103 (1899) is cited as supporting the above quoted principle. In that case the California Supreme Court affirmed the trial court's sustaining of a demurrer to the complaint which sought as an item of damage amounts for which plaintiff alleged that it would be liable to a third person because of the defendant's breach of contract with the plaintiff. It was alleged in the complaint that the third person "demanded" of plaintiff $1,000 and "threatened" to sue the plaintiff. The plaintiff also alleged that he had no defense to the suit and would have to pay the third party (something which appellee has not done here). The court nevertheless denied relief in the following words, at page 431:

> Assuming that plaintiff was liable to the third person, ". . . the complaint shows that the plaintiff has not discharged its liability to (the third person), nor has the latter taken any steps to enforce it, further than to make demand. He may never do so. Under such circumstances we do not think that the complaint states a cause of action against defendant."

Cf. McQuilkin v. Postal Tel. Cable Co., 27 Cal. App. 698, 151 Pac. 21 (1915).

In conclusion, appellant submits that even if it be conceded for purposes of argument that the findings of fact show that appellee was in fact liable to the United States for the definite sum of $4,100.66, the judgment rendered thereon cannot stand because there is no evidentiary support for such findings. The only evidence presented by appellee was a letter written by the United States to appellee claiming that appellee owed the United States $4,-100.66. [Pltf. Ex. 13.] To the extent that this letter was mailed to and received by appellee, appellant made no objection to it being introduced in evidence. Appellant, however, did point out to the trial judge that as evidence of the truth or falsity of the matters asserted therein this letter was purely hearsay. On that basis only it was admitted into evidence. [Tr. I, pp. 107-109.]

No other evidence whatsoever was offered by appellee to establish the amount of its liability to the United States. As exemplified by the very facts of this case, the amount claimed to be due by prospective plaintiffs is quite often excessive and it is not unreasonable to assume that the United States demanded of appellee a greater amount than it could actually prove it was entitled to under the law. At least in the absence of any competent evidence to establish the amount of the claim of the United States with a reasonable degree of certainty, appellant submits that the trial court's finding with respect to the $4,100.66 is wholly without evidentiary support.

California Civil Code, Sec. 3301;

Monaci v. Turner, 37 Cal. App. 2d 98, 98 P. 2d 755 (1940);

Coates v. Lake View Oil & Refining Co., 20 Cal. App. 2d 113, 66 P. 2d 463 (1937);

Stephany v. Hunt Brothers Co., 62 Cal. App. 638, 217 Pac. 797 (1923);

Brumby Metals v. Spalding Foundry Co., 89 Ga. App. 464, 79 S. E. 2d 568 (1953).

Conclusion.

For the reasons and upon the grounds hereinabove set forth, appellant respectfully urges the Court to reverse the judgment of the district court.

One of appellant's primary contentions is that it never entered into a contract with appellee for any type of cloth either on March 6, 1952, or thereafter. The evidence is wholly insufficient to support the contrary conclusion of the trial court, since the very language used in the purported contract and the admitted conduct of the parties themselves show without doubt that neither appellant nor appellee ever intended to bind themselves by contract. Moreover, the uncontradicted evidence shows that from the beginning of their negotiations a basic misunderstanding existed between appellant and appellee which prevented them from agreeing upon the same thing in the same sense.

Even if there were sufficient evidence to sustain the conclusion that appellant and appellee entered into a binding agreement, the findings of fact made by the trial court in this connection are fatally inconsistent and conflicting. These findings show on their face that the alleged contract was in fact neither certain nor complete but rather at most amounted to an agreement to enter into negotiations and in the future to execute an enforceable written contract.

Appellant's second basic contention is that the trial court erred in allowing appellee to recover (a) its claimed loss of profit on the government contract and (b) the amount the United States claimed from appellee for breach of its collateral contract with the United States, even assuming that appellant and appellee entered into a definite contract. The proper measure of damages to be applied for breach of a contract for the sale of goods is the difference between the contract price and the market price of the goods at the time of breach unless it be established that the goods were not obtainable on the open market. Appellant presented evidence not only that the necessary rayon fabric was ob-

tainable on the open market but also that appellee knew that such cloth was available. The trial court's failure to make a finding in this regard therefore constitutes reversible error.

Assuming that the trial court was not required to find that the requisite rayon cloth was not available on the open market, the elements of damage awarded appellee were nevertheless improper under the law of this jurisdiction. It is uncontradicted that appellee was an unestablished business seeking to operate in a new industry. In such a situation, claimed loss of profits are deemed *as a matter of law* to be too remote and speculative to be recovered. It is equally clear that the damage awarded appellee with respect to the money claimed by the United States was improper. In the first place, it was neither found nor admitted that appellee was in fact liable to the United States—or even that it was reasonably certain that such liability would follow in the future. In the second place, no evidence whatsoever was presented to establish the amount of the loss to the United States. In this regard, the only evidence introduced at trial was a letter of demand written to appellee by the United States. Appellant, moreover, duly objected to this letter as evidence that the United States had in fact been damaged or as evidence of the amount of that damage. Finally, the findings, conclusions and judgment in this connection are contingent, speculative and so inconsistent as to render the district court's judgment wholly erroneous.

Apart from the legal considerations here presented, it is difficult to conceive of any equitable basis for appellee's claim. From the documents contained in appellee's own files, appellant showed that appellee had estimated its maximum expected profit to the United States as $4,400.00. These documents also showed that appellee in any event could have avoided all of its alleged losses by the expenditure of only $722.50. Both of these facts were

known to Mr. Mills yet he made no effort to mitigate his supposed damage. Rather he deliberately chose to repudiate his contract with the government and sought to recover from appellant, not the estimated $4,400.00, but rather over $13,000.00 as his claimed loss of profit under that contract.

Dated: December 6, 1954.

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE,

Attorneys for Appellant.

JAMES S. CLINE,

Of Counsel.

Appendix I.

DEERING, MILLIKEN & Co.
Incorporated
Los Angeles Sales Office
111 West Seventh Street
Los Angeles

March 6, 1952

Modern-Aire of Hollywood, Inc.
1112 Sentous
Los Angeles 15, California

Attention: Mr. L. J. Mills

Dear Mr. Mills:

We understand from our conversation today in this office that we have consummated a contract with you for 101,200 yards of 45½" rayon cartridge cloth in the greige as per government specification PXS-1300 and also for 23,900 yards of the same material in 47½" width. These goods are to be furnished to you on terms of net 30 days, f.o.b. our mill, delivery on both items to start the week ending April 25th. We hope to be able to arrange the shipment of these goods to completion one-sixth of each width every two weeks. We understand your contract with the government on which these goods are to be used contains a 90% partial payment clause.

This memo is written with the idea of submitting (it) to the Government Procurement Office.

Very truly yours,

DEERING, MILLIKEN & Co., INC.
/s/ Lee Piersol
Regional Manager

Lee Piersol:ms

Appendix II.

DEERING, MILLIKEN & Co.
Incorporated

Los Angeles Sales Office
111 West Seventh Street
Los Angeles

March 6, 1952

Modern-Aire of Hollywood, Inc.
1112 Sentous
Los Angeles 15, California

Attention: Mr. L. J. Mills

Dear Mr. Mills:

This will confirm our quotation to you of today on 101,-200 yards of 45½" rayon cartridge cloth in the greige as per Specification PXS-1300 at 36⅛¢ per yard and 23,900 yards of the same material in 47½" width in the greige at 37⅜¢ per yard, both on terms of net 30 days, delivery to start in April and spread out to completion.

We are teletyping your order for these goods to our home office tonight subject to your receipt of the contract from the government; and, of course, the whole thing is predicated on our ability to handle the business when you are in a position to confirm it.

Very truly yours,

DEERING, MILLIKEN & Co., INC.
/s/ Lee Piersol
Regional Manager

Lee Piersol:ms

Appendix III.

Section 25 of the Restatement of Contracts and Comment "a." thereof read as follows:

> "If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.
>
> *"Comment:*
>
> "a. It is often difficult to draw an exact line between offers and negotiations preliminary thereto. It is common for one who wishes to make a bargain to try to induce the other party to the intended transaction to make the definite offer, he himself suggesting with more or less definiteness the nature of the contract he is willing to enter into. Besides any direct language indicating an intent to defer the formation of a contract, the definiteness or indefiniteness of the words used in opening the negotiation must be considered, as well as the usages of business, and indeed all accompanying circumstances."

Appendix IV.

Comment "a." of Section 26 of the Restatement of Contracts reads as follows:

> "Parties who plan to make a final written instrument as the expression of their contract, necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these provisions and no others, they have then fulfilled all the requisites for the formation of a contract. *On the other hand, if the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out; or if an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract.*" (Emphasis added.)